

N. 2813

No. 13545

United States
Court of Appeals
for the Ninth Circuit

R. W. MEYER, LIMITED,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the
Territory of Hawaii

FILED

APR 27 1953

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

P. CASS, Esq.,
2168 City View,
Eugene, Oregon, and

S. SHAPIRO, Esq.,
506 Stangenwald Bldg.,
Honolulu, Hawaii,

Attorneys for defendant in error-
appellant.

RHODA V. LEWIS, Esq.,
Deputy Attorney General of Hawaii,
Iolani Palace, Honolulu, Hawaii, and

T. W. FLYNN, Esq.,
Special Deputy Attorney General,
Territory of Hawaii,
1071 Bishop Street,
Honolulu, Hawaii,

Attorneys for Territory, plaintiff in error-
appellee.

[1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the Supreme Court of the Territory of Hawaii

No. 2829

In the Matter of the Application of R. W. MEYER,
LIMITED, to Register and Confirm Its Title
to Land Situate in Molokai, County of Maui,
Territory of Hawaii.

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

Notice is hereby given that R. W. Meyer, Limited, defendants in error above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Decision, Decree and Judgment of the Supreme Court of the Territory of Hawaii made and entered in the above entitled cause on the 23rd day of June, 1952.

Dated at Honolulu, T. H., this 25th day of June, 1952.

R. W. MEYER, LIMITED,
Defendant in Error

PHIL CASS & SAMUEL SHAPIRO
Its Attorneys

/s/ By PHIL CASS

Clerk's Certification attached.

[Endorsed]: Filed June 25, 1952.

[4]

[Title of Supreme Court and Cause.]

STATEMENT OF JURISDICTION

Comes now R. W. Meyer, Limited, by Phil Cass & Samuel Shapiro, its attorneys, and make the following Statement of Jurisdiction:

This is an appeal taken from the Decision, Decree and Judgment of the Supreme Court of the Territory of Hawaii made and entered in the above entitled cause on the 23rd day of June, 1952;

The amount in controversy exceeds the sum of \$5,000.00, exclusive of interest and costs;

This appeal is taken under authority of Title 28, USCA S 1293 permitting appeals to the United States Court of Appeals for the Ninth Circuit from all final decisions of the Supreme Court of the Territory of Hawaii, in all civil cases where the amount in controversy exceeds \$5,000.00, exclusive of interest and costs.

Dated: Honolulu, T. H., June 25, 1952.

PHIL CASS & SAMUEL SHAPIRO

/s/ By PHIL CASS,

Attorneys for R. W. Meyer, Limited,
Defendant in Error.

Clerk's Certification attached.

[Endorsed]: Filed June 25, 1952.

[Title of Supreme Court and Cause.]

APPLICATION FOR WRIT OF ERROR

To the Clerk of the Supreme Court of the Territory
of Hawaii:

Please issue a writ of error in the above entitled
cause to the Registrar of the Land Court of the
Territory of Hawaii, on behalf of the Territory of
Hawaii, plaintiff - in - error, returnable to the Su-
preme Court of the Territory of Hawaii.

Dated: Honolulu, T. H., July 7, 1950.

TERRITORY OF HAWAII,

Plaintiff-in-Error

/s/ By THOMAS W. FLYNN,

Deputy Attorney General, Territory
of Hawaii

[2]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the Territory of Hawaii, plaintiff-in-
error above-named, respondent and contestant in a
cause lately pending in the Land Court of the Ter-
ritory of Hawaii, entitled "In the Matter of the
Application of R. W. Meyer, Limited, to register
and confirm its title to land situate in Molokai,
county of Maui, Territory of Hawaii", and the said
Territory of Hawaii states that in the proceedings
in said cause in said Land Court, and in the de-

cision made and entered on the 27th day of January 1950, and in the decree made and entered therein on the 10th day of April 1950, there was and is manifest and prejudicial error in the particulars hereinafter set forth, that is to say:

Assignment of Error No. 1

The court erred in decreeing that the boundaries of the lands sought to be registered were in accordance [4] with the survey and map filed by the applicant, the same not being supported by the evidence adduced before the Land Court.

Assignment of Error No. 2

The court erred in failing to sustain the claim of the Territory of Hawaii to a portion of the lands sought to be registered, the said claim being fully and conclusively supported by the evidence.

Assignment of Error No. 3

The court erred in finding that royal patent grant No. 3539 to R. W. Meyer was issued on a portion of grant 3437 to R. W. Meyer.

Assignment of Error No. 4

The court erred in refusing to dismiss the application on the ground of failure of the application to be supported by a correct map and description.

Assignment of Error No. 5

The court erred in finding that Waihanau Valley was in the lands of Kahanui, the same being contrary to the evidence.

Assignment of Error No. 6

The court erred in holding in its decision that the deceased surveyor, one Mr. Monsarrat, was expressing merely an opinion as to the boundaries of the lands in question, being the lands of Kahanui, whereas this surveyor had in fact determined and described, and made a map of, the lands in question and the Hawaiian government had issued its grant on the basis of such determination and description and map. [5]

Assignment of Error No. 7

The court erred in failing to accord to official government registered maps and surveys the weight to which they were and are entitled.

Assignment of Error No. 8

The court erred in considering the awards of lands of Kahanui "by name only" where the application for registration of title was and is based solely upon the grants, by map and description, by the Hawaiian government.

Assignment of Error No. 9

The court erred in finding that "an award by name only conveys all property within its boundaries as known and used from ancient times" where the application herein involved has as its claim of title only the grant by the Hawaiian government, said grant being accomplished by map and detailed description, and there being no award or conveyance "by name only."

Assignment of Error No. 10

The court erred in its ruling that a written de-

scription prevails over a map or plat in a deed or grant, in this case where the court has failed to ascertain preliminarily whether there is a real or factual variance between the description and the map or plat.

Assignment of Error No. 11

The court erred in applying the rule that natural monuments prevail over maps and plats, in this case where the natural monument was not called for or identified. [6]

Assignment of Error No. 12

The court erred in finding a natural monument called for in the words "head of the valley", the same being general descriptive language and not a definitely ascertainable monument.

Assignment of Error No. 13

The court erred in finding the northern boundaries of the lands sought to be registered to be described by a natural monument, such finding being contrary to the evidence.

Assignment of Error No. 14

The court erred in finding that the intention of the original parties to the grant was to convey "some of the Makanalua lands", there being no evidence in support thereof.

Assignment of Error No. 15

The court erred in finding that the original grantee "did in fact describe the lands which he requested", there being no evidence in support thereof.

Assignment of Error No. 16

The court erred in finding that "an amended description was attempted to be included in the re-issued grant No. 3437 but it did, in fact, not include and did exclude the parcel which the applicant now claims ownership in fee" and notwithstanding such finding failed to deny the application on the obvious ground that the original grantee failed to receive the excluded portion of lands. [7]

Assignment of Error No. 17

The court erred in failing to find that grant 3539 was a separate grant from grant 3437, while in its decision the court specifically states that certain correspondence "refers to ridge lands between the two valleys which later became grant 3539".

Assignment of Error No. 18

The court erred in permitting testimony based on conversations with alleged "kamaainas".

Assignment of Error No. 19

The court erred in receiving purported "kamaaina" testimony on the part of witnesses who were not and could not be qualified as kamaainas.

Assignment of Error No. 20

The court erred in receiving into evidence any and all hearsay and purported "kamaaina" testimony, where the claim of title was on the basis of grants issued by maps and detailed descriptions by the Hawaiian government.

Assignment of Error No. 21

The court erred in admitting into evidence, and

refusing to strike from the record, the testimony of each of the following witnesses for the applicant: Theodore Searle, Thomas Cummins, Christina Meyer Tuitele, Bertha Meyer Aubrey, Ernest L. Meyer and Penn Henry Meyer, and of William Meyer (the latter testimony being admitted from the record of a former trial). [8]

Assignment of Error No. 22

The court erred in receiving into evidence applicant's Exhibit R, the affidavit of one A. Mauritz, the same not being admissible in evidence.

Assignment of Error No. 23

The court erred in receiving into evidence applicant's Exhibits S and T, being deeds of other lands to applicant's predecessor in title, the same not being admissible in evidence.

Assignment of Error No. 24

The court erred in receiving into evidence applicant's Exhibit W, copy of petition in eminent domain proceedings filed in the Second Judicial Circuit, Territory of Hawaii, entitled "Territory, etc., vs. Otto S. Meyer, et al.", the same not being admissible in evidence.

Assignment of Error No. 25

The court erred in finding that after a grantee accepts a patent grant of land from the government, it was thereafter material to consider what the grantee had applied to purchase.

Assignment of Error No. 26

The court erred in failing to find that the gov-

ernment map was controlling as to what constituted the remnant of Kahanui.

Assignment of Error No. 27

The court erred in finding that the grantee was to "receive all the valley lands necessary to be conveyed for the purpose of saving fencing", the same being contrary to the evidence. [9]

Assignment of Error No. 28

The court erred in concluding from prior correspondence between the government and original grantee that there was an ambiguity in the grant, there being neither patent nor latent ambiguity in the grant.

Assignment of Error No. 29

The court erred in finding that "Monsarrat's map and plat accompanying the grant shows a variance in fact in the northern and eastern boundary as compared to later maps", the same being contrary to the evidence.

Assignment of Error No. 30

The court erred in finding that the whole of the lele of Kahanui was "purchased by name" at the auction, the same being contrary to the evidence.

Assignment of Error No. 31

The court erred in applying as a rule of law, a proposition that in the interpretation of a grant the grant itself, together with "all the surrounding facts and circumstances" is the determining factor, the same being contrary to the true rule of law.

Assignment of Error No. 32

The court erred in finding the head of Waihanau Valley to be the big waterfall, the same being contrary to the only admissible evidence.

Assignment of Error No. 33

The court erred in failing to apply the rule of law that where there is no ambiguity in the descriptions and maps used in the conveyance, the same are to be taken as the conclusive evidence of the intention of the parties. [10]

Assignment of Error No. 34

The court erred in failing to apply the rule of law that where a conveyance is made by description and map, the map and description are binding upon the parties.

Assignment of Error No. 35

The court erred in failing to apply the rule of law that a government survey must be given preference over a private survey where there is a dispute.

Assignment of Error No. 36

The court erred in failing to apply the rule of law that the field notes and maps of the original surveyor are the primary evidence as to the true location of boundaries.

Assignment of Error No. 37

The court erred in failing to apply the rule of law that a surveyor's only duty is to relocate the courses and lines at the same place where originally located by the first surveyor on the ground.

Assignment of Error No. 38

The court erred in denying motion of the Territory for dismissal of the application at the conclusion of the evidence introduced on behalf of the applicant.

Wherefore, the said respondent, plaintiff-in-error, the Territory of Hawaii, prays that said decree [11] of April 10, 1950, be reversed, and that the cause be remanded to the Land Court of the Territory of Hawaii for dismissal of the application, and for such other relief as may be just and equitable under the circumstances.

Dated: Honolulu, T. H., July 7, 1950.

TERRITORY OF HAWAII,

Plaintiff-in-Error,

/s/ By THOMAS W. FLYNN,

Deputy Attorney General,

Territory of Hawaii.

[Endorsed]: Filed July 7, 1950. [12]

[Title of Supreme Court and Cause.]

WRIT OF ERROR

The Territory of Hawaii to: The Registrar of the Land Court of the Territory of Hawaii.

Application having been made on behalf of the Territory of Hawaii, a respondent in the above entitled cause, for a writ of error in said cause,

You are commanded forthwith to send to the Su-

preme Court of the Territory of Hawaii the record in said cause.

Witness the Honorable S. B. Kemp, Chief Justice of the Supreme Court of the Territory of Hawaii, this seventh day of July, 1950.

[Seal] /s/ LEOTI V. KRONE,

Clerk of the Supreme Court of the
Territory of Hawaii. [16]

To the Clerk of the Supreme Court of the Territory of Hawaii:

The execution of the within writ of error appears by the record hereto annexed, dated this twenty-sixth day of July, 1950.

[Seal] /s/ [Illegible]

Registrar of the Land Court of the
Territory of Hawaii. [17]

In the Land Court of the Territory of Hawaii
Application No. 1483

[Title of Cause.]

AMENDED APPLICATION

To the Honorable, the Judge of the Land Court:

The undersigned, R. W. Meyer, Limited, a corporation organized and existing under the laws of the Territory of Hawaii, hereby applies to have the land hereinafter described brought under the provisions of Chapter 307, Revised Laws of Hawaii, 1945, and to have its title therein registered and confirmed as an absolute title, and it declares:

(1) That it is a corporation, duly organized and

existing under and by virtue of the laws of the Territory of Hawaii and that it is the owner in fee simple of forty-one fifty-fourths ($41/54$) undivided interest in and to those certain parcels of land situate on the Island of Molokai, County of Maui, Territory of Hawaii, described and bounded as follows:

Being all of Grant 3437 to R. W. Meyer, and Grant 3539 to R. W. Meyer on a portion of Grant 3437 to R. W. Meyer.

Beginning at the Government Survey Triangulation Station "Puu Kaeo" on the edge of Waikalua Valley and on the boundary between Kahanui 3 and Kamiloloa, and running by true azimuths measured clockwise from South:

1. $86^{\circ} 03'$ 5118.70 feet along the land of Kamiloloa to a "+" cut in rock;
2. $138^{\circ} 44' 15''$ 3370.70 feet along the land of Kaunakakai (Land Court Application 632) to a "+" cut in rock; [35]
3. $134^{\circ} 36'$ 4785.00 feet along the land of Kalamaula to a "+" cut in rock;
4. $142^{\circ} 14'$ 2854.00 feet along the land of Kalamaula to a "+" cut in rock;

Thence along the top edge of pali along the Waihanau Valley in the land of Makanalua in all its turns and windings, the direct azimuth and distance between points being:

5. $289^{\circ} 53'$ 1387.30 feet to a pipe;
6. $204^{\circ} 42'$ 424.60 feet down spur at the head of Waihanau Valley in the land of Makanalua to a spike on edge of Waihanau Falls;

7. $246^{\circ} 16'$ 856.50 feet up spur at the head of Waihanau Valley in the land of Makanalua to a pipe;

Thence along the top edge of pali along the Waihanau Valley in the land of Makanalua in all its turns and windings for the next six courses, the direct azimuths and distances between points being:

- 8. $127^{\circ} 40'$ 1400.00 feet;
- 9. $180^{\circ} 47'$ 2950 feet;
- 10. $238^{\circ} 00'$ 550.00 feet;
- 11. $159^{\circ} 00'$ 1600.00 feet;
- 12. $163^{\circ} 00'$ 850.00 feet;
- 13. $209^{\circ} 00'$ 400.00 feet to a place called "Hoalae";
Thence along the top edge of pali along the Waialeia Valley in the land of Kalawao in all its turns and windings for the next 13 courses, the direct azimuths and distances between points being:
- 14. $272^{\circ} 52'$ 400.00 feet;
- 15. $338^{\circ} 15'$ 2100.00 feet;
- 16. $346^{\circ} 45'$ 2150.00 feet;
- 17. $42^{\circ} 15'$ 550.00 feet;
- 18. $345^{\circ} 05'$ 500.00 feet;
- 19. $5^{\circ} 00'$ 500.00 feet;
- 20. $353^{\circ} 43'$ 500.00 feet;
- 21. $357^{\circ} 58'$ 1082.60 feet to a pipe;
- 22. $331^{\circ} 35'$ 1400.00 feet;
- 23. $311^{\circ} 12'$ 400.00 feet;
- 24. $27^{\circ} 52'$ 319.80 feet to a pipe;
- 25. $294^{\circ} 36' 15''$ 2030.40 feet;
- 26. $231^{\circ} 36'$ 3877.70 feet;

Thence along the top edge of pali along Wai-kolu Valley in all its turns and windings for the next 4 courses, the direct azimuths and distances between points being:

27. 349° 32' 1421.70 feet to Government Survey Triangulation Station "Kaluahauoni";
28. 302° 23' 30" 1703.30 feet;
29. 329° 16' 30" 3329 feet;
30. 339° 58' 2543.70 feet to the point of beginning and containing an area of 1195 Acres.

(2) That Applicant is the owner in fee simple of a forty-one fifty-fourths ($41/54$) undivided interest in said property, and at the last assessment the said land was assessed at one thousand two hundred sixty-eight dollars (\$1,268.00).

(3) That Applicant does not know of any mortgage or incumbrance affecting said land, nor that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion, or expectancy, save and except the following:

1. That the Territory of Hawaii is occupying said land as a watershed as tenants by sufferance.
2. That the following persons own undivided shares in the properties shown hereunder.

* * * * * [37]

That Applicant obtained title to said lands:

1. By deed of Theodore T. Meyer, et al., dated November 28, 1935, recorded in Book 1375 Pages 145-147 (Abstract Page 75).
2. By deed of Bertha Aubery (unrecorded).
3. By deed of Victoria Meyer Ackerman dated

December 31, 1933, Book 1375 Pages 148-149 (Abstract Page 79).

4. By deed of Miala Meyer dated February 15, 1935, Book 1375 Pages 150-151 (Abstract Page 80).

5. By Decree in Equity No. 3958, in the Circuit Court of the First Judicial Circuit at chambers entitled Christina Tuitele, et al., vs. Margaret Ann Meyer, et al., dated November 25, 1938 (Abstract Page 102).

That Applicant is occupying said lands through its tenant by sufferance, the Territory of Hawaii.

* * * * * [39]

Dated: Honolulu, T. H., this eighth day of September, 1947.

R. W. MEYER, LTD.,
By THEODORE SEARLE,
Its President,

By NELSON TUI TELE,
Its Secretary. [43]

* * * * *

[Title of Land Court and Cause.]

ANSWER OF TERRITORY OF HAWAII TO FIRST CAUSE OF ACTION

* * * * *

Comes now the Territory of Hawaii by Walter D. Ackerman, Jr., Attorney General, one of the respondents herein, and hereby answers the first cause of action of the amended application on file herein

and demurs to the second cause of action thereof, as follows:

For answer to the first cause of action:

I.

Respondent alleges that, of the land claimed by the applicant and sought to be registered in this proceeding, applicant is not the owner of that certain piece of land shown colored in green on the map hereto annexed, marked Exhibit A, and made a part hereby by reference, said piece of land being hereinafter more particularly described, and that applicant does not own any interest in said piece of land. Respondent alleges that said piece [55] of land is part of the Ahupuaa of Makanalua, L. C. Aw. 11216, Apana 11, to Kekauonohi. That at the time of filing of this application and at all times involved in this proceeding and at the present time the Territory of Hawaii has been and is the owner of Makanalua, including said piece of land. That said piece of land, hereinafter called the "disputed area", is more particularly described as follows:

Portion of the land of Makanalua, L. C. Aw. 11216 Apana 11 to Kekauonohi, conveyed to the Minister of Interior by the Administrator of the Estate of L. Haalelea by deed dated May 9, 1866, recorded in Book 21 on page 207.

Beginning at the southeast corner of this parcel of land, the south corner of Grant 3539 to R. W. Meyer, at a point on the north boundary of Grant 3437 to R. W. Meyer, and on the top of the ridge between Waihanau and Waialeia Valleys, the co-

ordinates of said point of beginning referred to Government Survey Triangulation Station "Puu Kaeo" being 6017.22 feet north and 9191.83 feet west, and the direct azimuth and distance to said point of beginning from Government Survey Triangulation Station "Kaohu" being $305^{\circ} 50'$ 6180 feet, as shown on Government Survey Registered Map 1890, and running by azimuths measured clockwise from True South:

Around the head of Waihanau Valley in the land of Makanalua along Grant 3437 to R. W. Meyer, for the first three courses, the direct azimuths and distances between points being:

1. $105^{\circ} 11'$ 1517.50 feet;
2. $152^{\circ} 00'$ 740.00 feet;
3. $145^{\circ} 02'$ 309.50 feet;
4. $204^{\circ} 42'$ 424.60 feet down pali to spike at edge of water fall;
5. $246^{\circ} 16'$ 856.50 feet up pali to pipe on top of edge of the pali bounding the easterly side of Waihanau Valley; [56]

Thence along Grant 3539 to R. W. Meyer, along the top edge of the pali bounding the easterly side of Waihanau Valley, in all its turns and windings, for the next three courses, the direct azimuths and distances between points on the top edge of said pali being:

6. $318^{\circ} 02'$ 373.10 feet to a pipe;
7. $331^{\circ} 35'$ 1400.00 feet;
8. $347^{\circ} 58' 30''$ 538.00 feet to the point of beginning.

Approximate Area: 50 Acres.

II.

Respondent further alleges that applicant's map inaccurately depicts the boundaries of Grants 3437 and 3539, and inaccurately depicts the topography of said lands and the Waihanau Valley, and further, that neither said map nor the amended application shows the owners and occupants of all adjoining lands, as required by law, this information being wholly omitted as to the adjoining land of Makanalua.

III.

Further answering paragraph (1) of the amended application respondent denies that Grant 3539 to R. W. Meyer was issued on a portion of Grant 3437 to R. W. Meyer, and alleges that said Grant 3539 constitutes a separate grant for a piece of land not covered by said Grant 3437. That on the map hereto annexed as Exhibit A, said Grant 3437 is shown colored in red and said Grant 3539 is shown colored in yellow. That said Grants 3437 and 3539, omitting the disputed area colored in green on said map (Exhibit A), but not contesting applicant's description as to points of difference where the interests of the Territory of Hawaii are not materially prejudiced, cover two tracts of land [57] the metes and bound of which, separately described, are as follows:

Grant 3437 to R. W. Meyer

Beginning at Government Survey Triangulation Station "Puu Kaeo" on the top edge of the pali bounding the westerly side of Waikolu Valley, said triangulation station being at the southeast corner

of this grant, and the northeast corner of the land of Kamiloloa, thence running by azimuths measured clockwise from True South:

1. $86^{\circ} 03'$ 5118.70 feet along the land of Kamiloloa to a + cut in rock;
2. $138^{\circ} 44' 15''$ 3368.50 feet along the land of Kaulakakai (Land Court Application 632) to a + cut in rock;
3. $134^{\circ} 36'$ 4785.00 feet along the land of Kalamaula to a + cut in rock;
4. $142^{\circ} 10'$ 2854.00 feet along the land of Kalamaula to a + cut in rock;

Thence for the next seven courses, around the head of Waihanau and Waialeia Valleys, the direct azimuths and distances between points being:

5. $289^{\circ} 53'$ 1387.30 feet along Waihanau Valley in the land of Makanalua;
6. $325^{\circ} 02'$ 309.50 feet along same;
7. $332^{\circ} 00'$ 740.00 feet along same;
8. $285^{\circ} 11'$ 1517.50 feet along same;
9. $297^{\circ} 06'$ 44.30 feet to a pipe;
10. $294^{\circ} 34' 30''$ 2028.40 feet along Waialeia Valley in the land of Kalawao;
11. $231^{\circ} 36'$ 3877.70 feet along same;

Thence to the point of beginning along the top edge of the pali bounding the westerly side of Waikolu Valley in all its turns and windings for the next four courses, the direct azimuths and distances between points on the top edge of said pali being:

12. $349^{\circ} 32'$ 1421.70 feet to government survey triangulation station "Kaluahauoni";
 13. $302^{\circ} 23' 30''$ 1703.30 feet;
 14. $329^{\circ} 16' 30''$ 3329.10 feet;
 15. $339^{\circ} 58'$ 2543.70 feet to the point of beginning.
- Approximate Area: 995 Acres. [58]

Grant 3539 to R. W. Meyer

Beginning at the south corner of this parcel of land, at a point on the north boundary of Grant 3437 to R. W. Meyer, and on the top of the ridge between Waihanau and Waialeia Valleys, the coordinates of said point of beginning referred to Government Survey Triangulation Station "Puu Kaeo" being 6017.22 feet north and 9191.83 feet west, and the direct azimuth and distance to said point of beginning from Government Survey Triangulation Station "Kaohu" being $303^{\circ} 50'$ 6180 feet, as shown on Government Survey Registered Map 1890, and running by azimuths measured clockwise from True South:

Along the top edge of the pali bounding the easterly side of Waihanau Valley in the land of Makanalua, in all its turns and windings, for the next nine courses, the direct azimuths and distances between points on the top edge of said pali being:

1. $167^{\circ} 58' 30''$ 538.00 feet;
2. $151^{\circ} 35'$ 1400.00 feet to a pipe;
3. $138^{\circ} 02'$ 373.10 feet to a pipe;
4. $127^{\circ} 40'$ 1400.00 feet;
5. $180^{\circ} 47'$ 2950.00 feet;
6. $238^{\circ} 00'$ 550.00 feet;

7. 159° 00' 1600.00 feet;
 8. 163° 00' 850.00 feet;
 9. 209° 00' 400.00 feet to a place called "Hoalae";
Thence to the point of beginning along the top edge of the pali bounding the westerly side of Waialeia Valley, in the land of Kalawao, in all its turns and windings for the next twelve courses, the direct azimuths and distances between points on the top edge of said pali being:
 10. 272° 50' 400.00 feet;
 11. 338° 15' 2100.00 feet;
 12. 346° 45' 2150.00 feet;
 13. 42° 15' 550.00 feet;
 14. 345° 05' 500.00 feet;
 15. 5° 00' 500.00 feet;
 16. 353° 43' 500.00 feet;
 17. 357° 58' 1082.60 feet to a pipe;
 18. 331° 35' 1400.00 feet;
 19. 311° 12' 400.00 feet;
 20. 27° 52' 319.80 feet to a pipe;
 21. 117° 06' 44.30 feet along Grant 3437 to R. W. Meyer to the point of beginning.
- Approximate Area: 150 Acres. [59]

IV.

Further answering paragraphs (1), (2) and (3) of the first cause of action of the amended application:

(a) Respondent admits that applicant is a corporation duly organized and existing under the laws of the Territory of Hawaii.

(b) Respondent admits that applicant is the

owner in fee simple of an undivided interest in the land sought to be registered in this proceeding, excepting and excluding therefrom the disputed area which is owned by the Territory of Hawaii, but respondent is without knowledge or information sufficient to form a belief as to the extent of applicant's undivided interest, and therefore neither admits nor denies the allegations with respect thereto but leaves applicant to its proof thereof.

(c) Respondent admits that the land sought to be registered has been assessed for taxation at the value of one thousand two hundred sixty-eight dollars (\$1268) but alleges that the land so assessed for taxation did not include the disputed area, the same being the property of the Territory of Hawaii.

(d) Respondent denies the allegations set forth in the sixth and seventh lines of paragraph (3) of the first cause of action, page 3 of the amended application, and the last two lines of paragraph (3) of the first cause of action, middle of page 5 of the amended application. Respondent alleges that it is occupying the disputed area above described by virtue of its own right as owner, that respondent is not occupying any [60] other portion of the lands sought to be registered in this proceeding, and that respondent is not a tenant by sufferance, or any other class of tenant, of the applicant.

(e) Respondent is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph (3) of the first cause

of action (which begins on page 3 of the amended application) and therefore neither admits nor denies the same but leaves applicant to its proof thereof.

* * * * * [61]

Wherefore, this respondent prays:

1. That the first cause of action be dismissed as to the disputed area, and that said area be ordered, adjudged and decreed to be not the property of the applicant. [63]

2. That applicant be ordered and directed to revise and correct its map and application, so as to properly depict and set forth the boundaries of Grants 3437 and 3539, and so as to show the owners and occupants of all adjoining lands, as required by law.

3. That the second cause of action be dismissed.

Dated at Honolulu, T. H., this twenty-eighth day of November, 1947.

TERRITORY OF HAWAII,

By WALTER D. ACKERMAN, JR.,
Attorney General of Hawaii,

By RHODA V. LEWIS,
Assistant Attorney General,
Attorney for Respondent.

* * * * * [64]

[Title of Land Court and Cause.]

DECISION

There is one issue presently before the Court for determination at this time which may be designated as the issue created by the pleadings under the first cause of action or Count I of the application which heretofore by stipulation approved by the Court would be heard and determined through appeal by the parties prior to proceeding with the remaining ground of application. And in that connection, may I suggest to counsel now that perhaps it would be advisable for the record to file a written stipulation to that effect. The issue concerns the boundaries of Grant 3437, issued on October 29, 1899 and of Grant 3539, issued on May 5, 1891, both to R. W. Meyer as grantee, the present applicants being successors in title, as alleged in the application of the original grantee R. W. Meyer.

The area in dispute has been very clearly delineated in green coloring in Exhibit A annexed to the answer of the Territory and has been referred to in these proceedings as the disputed area. This area designated as the disputed area is more particularly described commencing on page 2 of the answer and pertains to lands in upper Kahanui, raising the overall question to to whether the applicant is the owner of these lands. In that connection, the Territory alleges ownership of the disputed parcel as a portion of the Ahupuaa of Makanalua, Land Court Award [69] 11216, Apana 11,

to Kakauonohi, and further alleges the Territory as owner of the entire area of Makanalua.

As to the grants the question for determination is whether or not Grant 3539 to R. W. Meyer, as a grant, was issued on a portion of Grant 3437 to R. W. Meyer, the same grantee, and in that connection raises the question in dispute as to the boundary of Grant 3437, particularly the northern line thereof.

By way of answer the Territory admits that the applicant is the owner in fee of an undivided interest in the land sought to be registered, save and except the disputed area referred to; that is, the applicant has title to whatever is included in the two grants save and except, of course, the disputed area.

The applicant claims Grant 3437 and urges an metes and bounds description in the grant, the applicant likewise urging the same as to Grant 3539, and that as such, the original grantee R. W. Meyer, creating the collateral question of fact as put by the applicants, as to whether or not the original grantee did receive what he applied and paid for.

As to the natural topography, the question arises in that aspect of the evidence of a determination of what constitutes "the head of Waihanau and Waialea Valleys" or, more particularly, the interpretation of the written description of the use of the language "the head of the valley," or admittedly, "the head of Waihanau Valley."

In that connection, the applicant contends that Waihanau Valley is in Kahanui, the Territory conversely claiming that Waihanau Valley is in Ma-

kanalua. The ultimate fact, therefore, for determination is the interpretation of the language "the head of Waihanau Valley," and a resulting determination of the boundary line on the ground created thereby. [70]

Much testimony and documentary evidence has been offered and received which brings the question in this particular proceeding to the weight to be accorded to the testimony and documentary evidence, very little of which is, to say the least, in accord with that offered by each party, one against the other.

There is testimony of surveyors and engineers, living surveyors or deceased surveyors and one deceased engineer, as admitted from the transcript in Law 14859.

It is the Court's understanding of the rule that all testimony by surveyors and engineers in a matter of this nature is to be given such weight as it is entitled to by way of opinion and conclusions. One of the deceased surveyors, namely, Mr. Monsarrat, and his works, have been the constant source of reference to, and the offering of his works and alleged works in the proceedings. Reference has been made to his excellent reputation as a surveyor for many years. However, the fact does remain that Mr. Monsarrat nevertheless is or was a surveyor, and testimony of that nature, together with all other testimony of a corresponding nature, must still be entitled to and be weighed as other testimony of surveyors and engineers in any particular given case. The fact that Mr. Monsarrat or any other

engineer was at one time accorded the reputation of being perhaps, and he may well have been the outstanding surveyor in the Territory of his time, let us assume, does not in the Court's understanding of the rule regarding the weighing of testimony entitle that testimony to be considered ipso facto as conclusive. It is not the rule of evidence as I understand it. If it were, the effect of reception of that nature of evidence would defeat the very foundation of the basic value of evidence in a case of this nature, which is its probative value, in arriving at the ultimate decision on the facts presented, and as weighed in [71] the light of all the facts, circumstances, and evidence in any particular case.

In this case, where we are concerned with issues under the evidence of facts, the testimony being presented from numerous sources, there is testimony of laymen, living laymen, one deceased, by way of affidavit, living lay persons as members of the family of the original grantee. There is testimony of surveyors, both living and deceased, there is testimony of an engineer now deceased, all covering a period of over sixty years last past. Further, there are documents in the form of official government maps and official government surveys, official government correspondence and maps and surveys of the non-governmental surveyors.

In that connection, all of the testimony has been of assistance to the Court in arriving at the ultimate fact to be determined here; all parties are, I am convinced, more than sincere and continue to be, in their efforts to arrive at a determination of the ultimate question of fact. But, nevertheless, the rule

must be borne in mind that the testimony of surveyors and engineers is, as I understand the rule, merely opinion and conclusions of professional men as such, and as such, as heretofore stated, are not for that reason accepted or to be accepted as conclusive in the face of other credible and reliable evidence.

The lands of Kahanui and Makanalua were both originally awarded by name only and not by survey description of boundaries. As the Court understands the rule in that connection, an award by name only conveys all property within its boundaries as known and used from ancient times. That is the law of this jurisdiction insofar as I am able to ascertain it. That is, the natural monuments prevail in any question in dispute.

There were numerous maps introduced as evidence herein, and [72] in the opinion of the Court, having reviewed over the past week end all the numerous maps and documents and all of the exhibits, the basis of all of them, that is almost all of them, is the parent map work and field notes of Mr. M. D. Monsarrat. Monsarrat's plat accompanies Grant 3437.

Further, it is the Court's opinion that Monsarrat's map and plat accompanying the grant shows a variance in fact in the northern and eastern boundaries as compared to later maps.

The law in that connection, as I understand it, is that where a description varies from the map or plat the written description prevails and controls over the plat.

Further, upon the survey aspect, there has been

much testimony of courses and calls and distances. Under the evidence there were mixed calls of every conceivable nature embracing courses and distances, natural boundaries and adjacent boundaries. As I understand the law in that connection, and applicable to the facts before the Court, the rule is that natural monuments as set forth in a written description, if ascertainable, prevail over the maps and plats where there is a conflict. This for the obvious reason that natural monuments are physical and factual, and, of course, resultingly speak for themselves.

As to the correspondence, all correspondence considered, the Court is of the opinion that the correspondence does in fact disclose what the grantor intended to convey and the grantee intended to receive, as to the general area to be conveyed. Further, that the correspondence shows that the grantee was to receive all the valley lands necessary to be conveyed for the purpose of saving fencing, and this even if it should incidentally include some of the Makanalua lands. At that time both the remnants of Makanalua and Kahanui were, of course, government lands. [73]

The Court further finds that R. W. Meyer, the original grantee, did in fact describe the lands which he requested, and the reasons described by Meyer, and designating them as "the remnant of Kahanui, which is part and parcel of my land and the whole thereof." Resultingly, the whole of the lele of Kahanui, in the Court's opinion, was purchased by Meyer at the auction, that is, purchased by name.

Further, that R. W. Meyer, the original grantee, complained that the description of the boundaries did not appear to be explicit, that is, with respect to the northern boundary. Resultingly, an amended description was attempted to be included in the reissued Grant 3437 but it did, in fact, not include and did exclude the parcel which the applicant now claims ownership in fee. Further, that the correspondence refers to ridge lands between the two valleys which later became Grant 3539, a portion thereof, and in that connection was referred to as being of so little value as not worth surveying.

Applying the rules, therefore, as the Court understands them in a proceeding wherein the grantee or the successors in interest of an original grantee are parties, or in this case an applicant, the rule, as I understand it, being that in the interpretation of a grant, as applied to this case, where the sovereign is the grantor and Meyer, the citizen, a grantee, the intention of the parties as drawn from the instrument, namely, the grant, viewed in connection with all the surrounding facts and circumstances, is the applicable rule of law to be applied.

Accordingly, the Court, upon the one issue now before it, will find and so holds that under all of the evidence and testimony and the law applicable thereto, and the record herein, viewed in connection with all the surrounding facts, that it was the intention of the grantor to convey to R. W. Meyer by Grant 3437 all [74] of the remnant of Kahanui not theretofore granted to him and to vest in the

original grantee R. W. Meyer all of the land or lele of Kahanui; which would include the question of boundary now for determination, the big fall in Waihanau Valley and the head of the valley, which the Court finds, as a matter of fact, to be the big fall, and the resulting boundary, the line at the top of the big fall.

The Court further finds the applicant is the owner in fee simple of an undivided interest in the disputed area, to be determined, however—there is no testimony before the Court and in the light of the comments made in the examiner's report, Penrose C. Morris, filed August 22, 1947, that question will remain open for further determination solely upon the extent and quantum of the undivided interest of the applicant; that the applicant, subject to that, is the owner in fee simple of the disputed area described and delineated in green coloring on the map attached to the answer as Exhibit A herein; further, that the applicant is the owner in fee simple, vested with an undivided interest to be determined at a later date, for the reasons heretofore stated, in all of the lands described in Paragraph No. I of the amended application at Pages 1, 2 and 3 of the amended application. Further proceedings in this matter will await, of course, counsel's move in the premises.

However, upon the instant matter, pursuant to the Court's oral findings just made, a decree embracing the findings and incorporating therein the findings of the Court, will be signed on presentation.

Dated this twenty-seventh day of January, 1950,
at Honolulu, T. H.

[Seal] EDWARD A. TOWSE,
 Second Judge of the Land Court.

[Title of Land Court and Cause.]

DECREE

In accordance with the stipulation filed herein by which the applicant and the respondent, Territory of Hawaii, agreed that the issue of the boundaries of the land under application and the title to the part of said lands shown to be disputed, as between said parties, should be finally adjudicated before any issue of law or fact presented pursuant to Act 207, Session Laws of 1947, shall be heard, and in accordance with the decision fined herein,

It is hereby ordered and decreed that the boundaries of the land subject to the application herein run in accordance with and as shown in the survey and map filed herein by the applicant, and that the applicant has a fee simple title to a forty-one fifty-fourths ($41/54$) undivided interest in said lands.

That respondent Territory of Hawaii's claim to a portion of the said land, as shown in its answer and the map attached thereto, is not sustained. [77]

The true boundaries of said land are as follows:

Forty-one fifty-fourths ($41/54$) undivided interest in and to those certain parcels of land situate on the Island of Molokai, County of Maui, Territory of Hawaii, described and bounded as follows:

Being all of Grant 3437 to R. W. Meyer, and Grant 3539 to R. W. Meyer on a portion of Grant 3437 to R. W. Meyer.

Beginning at the Government Survey Triangulation Station "Puu Kaeo" on the edge of Waikalua Valley and on the boundary between Kahanui 3 and Kamiloloa, and running by true azimuths measured clockwise from South:

1. $86^{\circ} 03'$ 5118.70 feet along the land of Kamiloloa to a "+" cut in rock;
2. $138^{\circ} 44' 15''$ 3370.70 feet along the land of Kaunakakai (Land Court Application 632) to a "+" cut in rock;
3. $134^{\circ} 36'$ 4785.00 feet along the land of Kalamaula to a "+" cut in rock;
4. $142^{\circ} 10'$ 2854.00 feet along the land of Kalamaula to a "+" cut in rock;

Thence along the top edge of pali along the Waihanau Valley in the land of Makanalua in all its turns and windings, the direct azimuth and distance between points being:

5. $289^{\circ} 53'$ 1387.30 feet to a pipe;
6. $204^{\circ} 42'$ 424.60 feet down spur at the head of Waihanau Valley in the land of Makanalua to a spike on edge of Waihanau Falls;
7. $246^{\circ} 16'$ 856.50 feet up spur at the head of Waihanau Valley in the land of Makanalua to a pipe;

Thence along the top edge of pali along the Waihanau Valley in the land of Makanalua in all its turns and windings for the next six

courses, the direct azimuths and distances between points being:

8. $127^{\circ} 40'$ 1400.00 feet;
9. $180^{\circ} 47'$ 2950 feet;
10. $238^{\circ} 00'$ 550.00 feet;
11. $159^{\circ} 00'$ 1600.00 feet;
12. $163^{\circ} 00'$ 850.00 feet;
13. $209^{\circ} 00'$ 400.00 feet to a place called "Hoalae";
Thence along the top edge of pali along the Waialeia Valley in the land of Kalawao in all its turns and windings for the next 13 courses, the direct azimuths and distances between points being:
14. $272^{\circ} 52'$ 400.00 feet;
15. $338^{\circ} 15'$ 2100.00 feet;
16. $346^{\circ} 45'$ 2150.00 feet;
17. $42^{\circ} 15'$ 550.00 feet;
18. $345^{\circ} 05'$ 500.00 feet.
19. $5^{\circ} 00'$ 500.00 feet;
20. $353^{\circ} 43'$ 500.00 feet;
21. $357^{\circ} 58'$ 1082.60 feet to a pipe;
22. $331^{\circ} 35'$ 1400.00 feet;
23. $311^{\circ} 12'$ 400.00 feet;
24. $27^{\circ} 52'$ 319.80 feet to a pipe;
25. $294^{\circ} 36' 15''$ 2030.40 feet;
26. $231^{\circ} 36'$ 3877.70 feet;

Thence along the top edge of pali along Wai-kolu Valley in all its turns and windings for the next 4 courses, the direct azimuths and distances between points being:

27. $349^{\circ} 32'$ 1421.70 feet to Government Survey Triangulation Station "Kaluahauoni";

28. 302° 23' 30" 1703.30 feet;
29. 329° 16' 30" 3329 feet;
30. 339° 58' 2543.70 feet to the point of beginning
and containing an area of 1195 Acres.

Subject, however, to that certain proceeding in Eminent Domain filed in the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, Entitled, Territory of Hawaii, by Walter D. Ackerman, Jr., its Attorney General, Plaintiff, vs. R. W. Meyer, Limited, et al., defendants, being Law No. 1518 of said Court and Notice of Pendency of Action filed in said proceeding dated September 22, 1948, filed for record in the Bureau of Conveyances as Lis Pendens Document No. 580.

Dated at Honolulu, T. H., this tenth day of April, 1950.

[Seal] /s/ EDWARD A. TOWSE,
Judge of the Land Court,
Territory of Hawaii. [80]

In the Supreme Court of the Territory of Hawaii
October Term 1951

[Title of Cause.]

OPINION OF THE COURT

Argued April 17, 1952. Decided May 19, 1952.

Le Baron, J., and Circuit Judges Corbett and Brown in Place of Towse, C. J., and Stainback, J., Disqualified.

Public Lands—survey and disposal of government lands of the Kingdom of the Hawaiian Islands—

statutory requirements of prior survey and of public record thereof—compliance—a prerequisite of sale—royal patents by necessary implication drawn in conformity with survey.

Compliance with statutory requirements that government lands be accurately surveyed before sale and that the surveys resulting therefrom be kept as public records not only constitutes a prerequisite of sale, but by necessary implication, indicates that the royal patents conveying those lands by surveyed description and map were drawn in conformity with those official surveys so made and kept.

Same—same—royal patents—surveyed description and map on face of patent as parts of the grant—construction—official survey and substantiating government surveys and maps—construed together with grant. [345]

In construing a royal patent all parts of the grant are to be considered in conjunction with prior official survey and substantiating government surveys and maps registered before the patent was drawn and since kept as public records.

Same—same—same—same—unambiguous grant—parol evidence at variance with or contradictory to terms of grant inadmissible.

If there be no ambiguity, parol evidence is inadmissible to vary or contradict the terms of the grant.

Same—same—same—same—parol evidence admissible on question of location.

Where the question is one of location as distinguished from one of construction, parol evidence

is admissible to connect the land with the grant or to apply the grant to the land.

Boundaries—description—natural and permanent objects.

A natural and permanent object is of no probative value in establishing the boundary of land conveyed by surveyed description and map if the grant, official survey, the work of the government surveyor and substantiating government surveys and maps contain no description of that object or reference to it and there is no evidence directly connecting it with the land conveyed. [346]

Opinion of the Court by LeBaron, J.

This is an action in the land court. The applicant is a Hawaiian corporation and claims a forty-one fifty-fourths ($41/54$) undivided interest in fee simple to certain lands on the island of Molokai as described in its application. The applicant's original source of title thereto is from Kalakaua, King of the Hawaiian Islands, who conveyed unawarded government lands, "situated at Kahanui in the island of Molokai," to R. W. Meyer by two separate and distinct grants. The first is Royal Patent Number 3437, dated October 13, 1888, but subsequently canceled and a new patent of the same number substituted for it on October 29, 1889, to correct misspellings in the names of the two main valleys adjoining the land conveyed on its northern boundary. The new patent, hereinafter referred to as Royal Patent Number 3437, however, made no difference in the location of that boundary or in that of any

other boundary, the new, in the same language and with identical sketch map attached as the old, describing that land and stating that it contains an area of 1048 acres more or less. The second grant is Royal Patent Number 3539, dated May 5, 1891, which, with sketch map attached, describes the land conveyed as beginning at a certain point on the northern boundary of Royal Patent Number 3437, extending north along center of ridge and containing an area of 20 acres more or less. Thus were conveyed government lands totaling an area of 1068 acres "more or less."

Two causes of action are alleged by amended application. In the first cause the applicant seeks to have its undivided interest registered and confirmed as an absolute title. The lands subject to that interest are referred to in such application as "all of Grant 3437 to R. W. Meyer and Grant 3539 to R. W. Meyer on a portion of Grant 3437 to R. W. Meyer," and as "containing [347] an area of 1195 acres." The amended application alleges that the Territory is a tenant of the applicant on those lands by sufferance. In the second cause the applicant seeks to have its claim for rentals upon an implied contract adjudicated against the Territory. To the first cause of action, the Territory filed an answer which lays claim of title to an area in dispute of 50 acres within the area claimed by the applicant. It alleges that applicant's map inaccurately depicts the boundaries described by Royal Patents Numbers 3437 and 3539 and inaccurately depicts the topography of the lands conveyed and of Waihanau

Valley so as to include a portion of Waihanau Valley within the lands conveyed, which portion is a part of the adjoining land of the Makanalua and constitutes the area in dispute. It further admits that the "applicant is the owner in fee simple of an undivided interest in the land[s] sought to be registered in this proceeding, excepting and excluding therefrom the disputed area which is owned by the Territory of Hawaii," but denies that the Territory is a tenant by sufferance, alleging that it is only "occupying the disputed area above described by virtue of its own right as owner." To the second cause of action the Territory filed a demurrer. But that demurrer was not considered below, the issues raised by it to the second cause of action being reserved for future determination until a time after the issues raised by the answer to the first cause of action had been finally determined. Nothing concerning the second cause of action, therefore, is before this court for appellate review. The first cause of action alone was tried below.

The sole issue before the land court for determination by stipulation of the parties was the location of the middle western portion of the northern boundary of Royal Patent Number 3437, the locations of the extreme western and the eastern portions of that boundary, as well as those of the entire eastern, southern [348] and western boundaries not being in dispute but admittedly established by the description in the grant, consistent with prior existing government surveys and maps. That issue required the land court to interpret the language of

the call for the western portion of the boundary between the agreed point certain on the extreme northwestern tip of Royal Patent Number 3437 and that designated as triangulation point "A," to the southeast on the northern boundary thereof, where the center ridge line of Royal Patent Number 3539 joins that boundary at the edge of Waialeia Valley. Such language calls for a meander line commencing with "a stone marked with a cross at the edge of Waihanau Valley thence around the head of the Waihanau" Valley to "A" as the southeast point above set forth. Over the objection of the Territory, the land court on such issue admitted parol or extrinsic evidence of ancient boundaries on the theory that Royal Patent Number 3437, as well as the other patent, constituted a grant "by name only." On that evidence, it in effect interpreted the language of the call to mean a portion of boundary "as known and used from ancient times" and determined the intention of both patents to convey, not according to surveyed descriptions, but according to ancient boundaries. It therefore found that the language "at the edge of Waihanau Valley thence around the head of the Waihanau" Valley described an ancient boundary, as depicted in the amended application, so as to include the disputed area. Consistent therewith, the land court entered a decree sustaining the applicant's claim of title to the disputed area and denying that of the Territory.

The Territory relies upon eight specifications of error covering its thirty-eight assignments of error. No useful purpose would be served by setting them

forth. Suffice it to say that they challenge, *inter alia*, the description in the amended application depicting the middle western portion of the northern [349] boundary of Royal Patent Number 3437 and the adoption of it by the land court; the admission of parol or extrinsic evidence to prove that such portion constitutes an ancient boundary; the underlying theory of the land court's finding that the intention thereof was to convey, not according to surveyed descriptions based upon existing government surveys and maps, but according to ancient boundaries in disregard of such descriptions; and its failure to properly apply the language of the call for such portion of the boundary to the ground, as well as to limit the inquiry of trial to a following of the steps of the government surveyor who made the actual survey and maps for the government before the unawarded government land was conveyed by Royal Patent Number 3437, as indicated by those surveys and maps and by the supporting field notes of the government surveyor. Those specifications, however, present before this court the same issue of location and require it to interpret the same language of the call for the middle western portion of the northern boundary of Royal Patent Number 3437 as presented and required below.

The applicant does not seriously argue before this court that either royal patent constitutes a grant "by name only," even though the theory that both of them did is the essential basis of the decree from which the Territory sued out the instant writ. Indeed, it could not do so with cogent reason. Admit-

tedly, both patents are of the same character of grant. The call to be interpreted, however, is in Royal Patent Number 3437 and only the character of that patent need be considered. The land conveyed thereby, being government land of more than three hundred dollars in value, was required by statute not only "to be correctly surveyed" before it was sold but to be sold "at public auction," the survey likewise being required to "be kept in the office of the Minister [of the Interior], open to inspection of any one who may desire [350] to examine the same." (Haw. Comp. L. 1884 §§ 47, 42, sub-par. 1.) Compliance with these statutory requirements constituted a prerequisite of sale. That prerequisite was fully met. Thus, the land was actually surveyed in 1885 by the government surveyor, one M. Douglas Monsarrat, now deceased, who made extensive field notes. His survey and field notes, together with four official government surveys and maps made in accordance with them, were filed and registered with the office of the Minister of the Interior in 1886 and since that time have remained public records in the files of the government. As already indicated, the patent issued in 1888 and reissued in 1889. It describes the land by metes and bounds and by other calls consistently with those surveys and maps. Fastened between its pages is a sketch map as a part of the patent on its face. That map clearly outlines the shape of the land conveyed and portrays the courses of its boundaries. It indicates not only the commencing point of survey but other government survey stations on the boundary lines of

the land conveyed. It also shows the location of adjoining lands, inclusive of the upper ends of the valleys bordering from the north. Moreover, such map is on the same scale as a corresponding government survey and map of 1886, so that tracings of one would substantially coincide with those made from the other.

The patentee was fully aware of the character of Royal Patent Number 3437 as a grant by surveyed description and map in contradistinction to one "by name only." He himself was a surveyor. It was he who advised the government by letter that "M. Douglas Monsarrat surveyed this piece of land" and enclosed with his formal application for the patent Monsarrat's surveyed description of it. After purchasing that land at public auction and after issuance of the patent in 1888, the patentee claimed that an additional piece of land should have been included. But he was reminded by the Minister of the Interior that "the sale [351] was made by a map and detail description both made by Mr. M. D. Monsarrat, excluding the piece which you claim." In response to that reminder he conceded that "it would be illegal to add anything to a Royal Patent for a piece of land sold by survey" and he merely had misspellings corrected by a reissuance of the patent. Thereafter he applied for and purchased the piece claimed by him as the ridge land adjoining the northern boundary of the patent at point "A," which would have been unnecessary had the patent been a grant "by name only" so as to include within its ancient boundaries that piece. He thus

acted consistently with the obvious character of the patent, which on its face manifested the grant's intention to convey land according to the surveyed description and map contained in the grant, there being no intention to convey land according to what had been "known and used from ancient times."

The determinative source of the surveyed description and map as parts of Royal Patent Number 3437 on its face was the reservoir of official surveys and maps, as well as supporting field notes, filed and registered in the office of the Minister of the Interior where the patent was prepared. Indeed, compliance with the statutory requirements of prior survey and of public record of that survey not only constituted a prerequisite of sale but by necessary implication indicates that the sale was made and the patent drawn in conformity with such survey. Resort, therefore, may be had to that public record, as well as to the other public records substantiating it, for the purpose of controlling the calls in the grant. Those public records are to be construed with the grant should it require construction. (See *Newman v. Foster*, 3 How. [U.S.] 383, 34 Am. Dec. 98; *Steele v. Taylor*, 3 A. K. Marsh [Ky.] 225, 13 Am. Dec. 151; *Vaught v. McClymond*, 155 P. [2d] 612 [Mont.]; *Lyon v. Fairbanks, et al.*, 79 Wis. 455, 48 N. W. 492.) But no construction is required of the grant, [352] which admittedly is a valid conveyance without any patent ambiguity appearing on its face. Consistent with the excellent reputation of the government surveyor as the outstanding surveyor of his time in the Hawaiian Kingdom, the grant

contains no errors or mistakes to be corrected and gives rise to no latent ambiguities when its language is applied to the ground.

The crux of the case concerns the location of a portion of boundary, rather than a construction of the grant, and involves the admissibility of parol or extrinsic evidence. Upon that crucial point this court has authoritatively declared the settled law to be, where, as here, there is no ambiguity, that "parol evidence is inadmissible to vary or contradict the terms of the grant." (*Ookala S. Co. v. Wilson*, 13 Haw. 127, 131.) It further likewise declared that "It is also settled that parol evidence is admissible when the question is one of location as distinguished from one of construction, that is, such evidence is admissible to connect the land with the grant or to apply the grant to the land." (*Ookala S. Co., v. Wilson*, *supra*.) These principles, simply stated, are decisive of the solution of the problem before this court, the objective being to give effect to nothing else but the grant's intention to convey land according to its surveyed description and map.

Within those principles, parol or extrinsic evidence was properly employed to locate all the boundaries of Royal Patent Number 3539. Illustrative thereof, the applicant applied to the ground not only the language of the grant for a surveyed line along the center of a ridge but a more definite survey of the land itself by the government surveyor on file with the government, presumably as a part of the grant, and readily located the boundaries of the land conveyed. The natural monument descriptive

thereof was found by that process to be the continuous contour line of the entire eastern edge of Waihanau Valley and of the [353] entire western edge of Waileia Valley as parallel valleys between which the ridge extended to the north from point "A" on the northern boundary of Royal Patent Number 3437.

Within the same principles, parol or extrinsic evidence was properly employed to locate all the boundaries of Royal Patent Number 3437 except the middle western portion of its northern boundary, the location of that portion being in dispute. Illustrative thereof, the applicant applied to the ground the language of the grant for the extreme western portion and for the eastern portion of the northern boundary and readily located those portions. Likewise, the entire eastern boundary of Royal Patent Number 3437 was located. The language of the call for the eastern boundary is comparable to that for the northern. It calls for a meander line commencing with the eastern terminal point of the course for the northern boundary at the edge of Waikolu Valley "thence along the edge of Waikolu Valley to initial point," also on the edge thereof. The natural monument, descriptive of and common to the extreme western and eastern portions of the northern boundary and the entire eastern boundary, was found by that process of application to be the contour line of continuous mountains meandering along the edges of the respective three adjoining valleys similar to that surrounding the ridge land of Royal Patent Number 3539. In this connection, the Terri-

tory had no difficulty in applying the language of the call for the western portion of the northern boundary of Royal Patent Number 3437 to the ground. In doing so, the natural monument descriptive of the middle western portion of that boundary was found to be a continuation of the contour line connecting the extreme western portion with the eastern portion thereof and common to the boundary as a whole. Indeed, any competent surveyor, even without the aid of the government surveyor's field notes, would have had no difficulty in so locating such middle western portion of the northern boundary by the same process. This [354] is indicated by the topography of Waihanau Valley, to which the language of the call is directed with respect to the edge and head of that valley.

To appreciate that topography and to understand that call, the ordinary and usual meaning of the word "valley," the word "head" and the term "around the head" of a valley must be borne in mind so that the language of such call may be properly applied to the ground. The pertinent definition of a valley in Webster's dictionary is "an elongate depression * * * between bluffs, or between ranges of hills or mountains." That of a head is "the end of anything regarded as the upper end, through being higher, being associated with the head of a person, being opposite to the foot, or any like association of ideas; as the head of a * * * valley * * *." The term "around the head" of a valley denotes a line of curvature with its apex at the topmost part of the upper end of the valley. It has

the same meaning as that of the term "along the edge" of a valley, when limited to the upper end, and has a comparable meaning to that of the term "around the shoulder" of a valley or other protruding parts thereof.

Waihanau Valley is "an elongate depression * * * between * * * mountains." Its foot is to the north toward the sea and its head to the south toward the center of the island, the head being "the upper end, through being higher." Its floor, down which runs a stream, progressively ascends in elevation but the mountains creating the definitive depression remain fairly constant at an elevation of 2600 feet on the western edge and 2700 feet on the eastern. When the parts of that valley are depicted by an association of ideas to corresponding parts of a person the wide depression between the mountains before they commence to converge may be termed "the body"; the adjoining narrowing depression as those mountains converge may be termed "the shoulders"; the adjoining long gorge where those mountains converge and run almost parallel to each other may be termed "the neck"; and the adjoining wider and shorter ravine where those mountains diverge at the southern end of the gorge and then reconverge at the southern edge of the valley may be termed "the head." By like association of ideas, the crown or topmost part of the head may be placed at the point where the mountains reconverge by an overlapping of ridges at an "S bend" of the stream bed so as to virtually terminate the definitive depression, except for the stream bed, the contour lines of those ridges

being at the elevation of 2400 feet at the center point of overlap, which is the southern edge of the valley at the crown of its head. Thus, the entire edge of the valley forms a hairpin loop with an elevation of 2600 feet on the western side of the valley, one of 2400 feet on its southern side and one of 2700 feet on its eastern.

The language of the call for the western portion of the northern boundary of Royal Patent Number 3437 demands that it be interpreted objectively in relation to the physical features of Waihanau Valley so that every word be given significance. When this is done the meaning is plain and signifies a meander line commencing with "a stone marked with a cross at the [western] edge of Waihanau Valley thence [curving along that edge in a southerly direction to the topmost part of the valley's upper end] around the head of Waihanau" Valley and thence east to point "A." That language, so interpreted, calls for a single meander course which is southeast, south and east and within which are confined the necessary turns and windings of the valley's edge.

Strongly corroborative of that meaning as the true interpretation of the language of the call for the western portion of the northern boundary is the sketch map as a part of the grant itself. That map portrays the same meander course for that portion of boundary and, without dispute, does so correctly for the [356] extreme western portion of the same boundary, as well as for the eastern portion. In

further corroboration thereof, the official government surveys and maps all identify the same meander course of the same boundary and may be resorted to for the purpose of controlling the call for that boundary. On one of them the government surveyor, in his own handwriting, marked the letter "K" as a triangulation point upon that course. That point is admittedly located with certainty in his field notes by being twice coordinated with different government survey stations and other fixed points. It therefore further not only identifies the same meander course but controls the call for the boundary along that course. Nor is there anything to the contrary to be found in the grant or in those public records. Thus, the single meander course is identified with absolute certainty as one along which runs the western portion of the northern boundary. Such identification operates to amplify the meaning of the language of the call for that portion as interpreted by this court. No other meaning suffices to meet the grant's intendment. That meaning therefore governs the location of that portion as to course. Consistent therewith, the answer of the Territory correctly describes and locates such portion and in doing so properly excludes the disputed area from the land conveyed by Royal Patent Number 3437.

Needless to say, the amended application of the applicant contradicts the meaning of the language of the call for the middle western portion of the northern boundary of Royal Patent Number 3437 as interpreted by this court. In doing so, the amended

application not only contradicts but varies the terms of the grant itself, so as to add the area in dispute to land conveyed, and thereby violates the grant's intention and encroaches upon the land of the Territory. This the applicant accomplished by ignoring the sketch map's portrayal of the single meander course for the entire [357] western portion of the northern boundary as a part of the grant, by refusing to be guided by official government surveys and maps or to follow in "the footsteps" of the government surveyor, and by improperly applying the language of the call to the ground. Illustrative thereof, the applicant in its amended application creates four courses out of the single meander course by departing due north from the western edge of Waihanau Valley at a point it arbitrarily fixed, which is short of point "K" further southeast along such edge, so as to go down its side for a depth of four hundred feet at the base of its head to the floor of the valley, where there are several spectacular big waterfalls, then up the opposite side of the valley to its eastern edge for a height of six hundred feet and then along that edge due south to point "A." Applicant's excuse for so cutting off the head of the valley is premised solely upon parol or extrinsic evidence. That evidence consists of the testimony of various witnesses, the correspondence between the patentee and the Minister of the Interior, letters of Monsarrat and other documents. It deals generally with ancient boundaries and specifically with the big waterfalls. It tends to prove, assuming without deciding such probative tendency,

that the top of those falls has been considered "since ancient times" to be the head of the Waihanau Valley as a natural monument descriptive of an ancient boundary and was used and regarded by the patentee for the purpose of marking the middle western portion of the northern boundary of Royal Patent Number 3437.

Although the law is well-settled that parol or extrinsic evidence is admissible to locate and explain natural monuments descriptive of the land conveyed, no citation of authorities is necessary to say that such evidence is inadmissible to locate and explain any object not descriptive thereof. Moreover, the test of whether an object be such a natural monument so as to mark a [358] boundary of the land conveyed is that it must be connected with that land. The parol or extrinsic evidence relied upon by the applicant does not meet that test. It pertains to the object of the big waterfalls but does not connect that object with the land conveyed. Nor do the surveyed description and map as parts of the grant, the official government surveys and maps and the work of the government surveyor, none of which describes such object to mark a boundary of the land conveyed. The evidence so relied upon therefore has no probative value or force to prove anything descriptive of the middle western portion of the northern boundary of the land covered by Royal Patent Number 3437. (See *Vireca Corporation v. Cole, et al.*, 129 S. W. [2d] 433 [Tex. Civ. App. 1939].) Nor does that evidence purport to locate and explain any monuments, natural or artificial, which

are descriptive of such portion. On the contrary, it completely ignores them, as well as their locations. It does so by radically departing from the well-established and easily ascertainable single course of boundary and by substituting for the descriptive monuments along that course the big waterfalls located elsewhere. This attempt to supplant a course of boundary and to displace descriptive monuments upon it is beyond the permissible limits of parol or extrinsic evidence, otherwise boundaries delineated by surveyed description and map could always be disturbed. In short, the evidence relied upon by the applicant goes outside the land conveyed by grant on surveyed description and map, in contradiction of and at variance with the terms of the grant itself. It therefore is inadmissible and constitutes no valid excuse in law or in fact, either for the applicant to claim the area in dispute or for the patentee to have used and regarded, if he did, the big waterfalls for the purpose of marking any portion of boundary for the land conveyed by Royal Patent Number 3437. [359]

The decree of the land court is reversed and the cause remanded below with instructions to order the applicant to amend its amended application by striking out the disputed area, in lieu of an order dismissing such application, and for such further proceedings as may be consistent with this opinion.

T. W. Flynn, Special Deputy Attorney General
(W. D. Ackerman, Jr., Attorney General, and T. W.

Flynn, Deputy Attorney General, on the briefs),
for plaintiff in error.

P. Cass (S. Shapiro with him on the brief) for
defendant in error.

/s/ SAM LEBARON,

/s/ R. CORBETT.

[Endorsed]. Filed May 10, 1952. [360]

In the Supreme Court of the Territory of Hawaii
October Term 1951

No. 2829

In the Matter of the Application of R. W. MEYER,
LIMITED, to Register and Confirm its Title to
Land Situate in Molokai, County of Maui, Ter-
ritory of Hawaii.

JUDGMENT ON WRIT OF ERROR

In the above entitled cause, pursuant to the opin-
ion of the Supreme Court rendered and filed on the
nineteenth day of May, 1952, and pursuant to the
order of the Supreme Court rendered and filed on
the sixteenth day of June, 1952, denying the peti-
tion for rehearing, the decree appealed from is re-
versed and the cause remanded to the Land Court
of the Territory of Hawaii with instructions to
order the applicant to amend its amended applica-
tion by striking out the disputed area, in lieu of an
order dismissing such application, and for such fur-

ther proceedings as may be consistent with said opinion.

Dated at Honolulu, Territory of Hawaii, this twenty-third day of June, 1952.

By the Court:

/s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ SAM LEBARON,
Associate Justice.

[Endorsed]: Filed June 12, 1952. [375]

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that all of the documents and items listed in the index to the certified record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled case are the originals on file in said matter and the above court pursuant to Order to Include Original Exhibits in Record, filed June 25, 1952, and in pursuance of the praecipe filed June 25, 1952. I further certify that the original record, comprised of two volumes, of the Supreme Court, numbered 2829, is transmitted herewith, together with all of the original exhibits and the transcript of evidence, No. 1483, two volumes, filed in the above court. I

further certify that the said Supreme Court record No. 2829, two volumes, and all exhibits and transcript of evidence, in two volumes, are attached hereto. I further certify that all costs in connection with the transcript of the record to the United States Court of Appeals for the Ninth Circuit have been paid by the attorneys for the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the above court this fifteenth day of September, 1952.

/s/ LEOTI V. KRONE,
Clerk. [417]

In the Land Court of the Territory of Hawaii
Application No. 1483.

In the Matter of the Application of R. W. MEYER,
LIMITED.

TRANSCRIPT OF EVIDENCE

The above entitled and numbered cause came on for hearing on the 11th day of January, 1950, at 9:30 a.m.

Before: Honorable Edward A. Towse, Judge, presiding.

Appearances: Phil Cass, Esq., for the Applicant; Thomas W. Flynn, Deputy Attorney General, for the Territory of Hawaii. [1*]

(The clerk called the case.)

* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

The Court: Are the parties ready?

Mr. Cass: The applicant is ready, your Honor.

Mr. Flynn: Ready for the Territory, your Honor. [2]

* * * * *

Mr. Cass: As to the present hearing, the applicant and the Territory, the only persons who are contesting the title, have entered into a stipulation that the Court may hear and try and determine the title issues normally the function of the Land Court, and separate and apart from those special issues, jurisdiction for which is conferred by the Session Laws of 1947, and that no hearing will be had on any issue of law or fact under the Session Laws of 1947 until the question of title to the land has been judicially determined finally.

Is that your understanding, Mr. Flynn?

Mr. Flynn: That is about correct. I would endeavor to clarify only slightly, for convenience.

Mr. Cass: Please clarify.

Mr. Flynn: To the effect that the parties are now to proceed in the Land Court under only the first cause of action in the application, which is simply the standard type of Land Court application for the registration of land. The second cause of action, being that coming under the special legislation of 1947, to be entirely disregarded until a final judicial determination as to the merits of the first cause of action.

The Court: I understand final disposition contemplates an appeal.

Mr. Cass: It does.

Mr. Flynn: Possibly including an appeal.

The Court: Possibly. Let's make it definite.

Mr. Flynn: Definitely. In other words, appeal if the party takes one, yes.

The Court: The stipulation as offered will be approved. Let the stipulation appear of record. [3]

* * * * *

Mr. Cass: In discussion of this matter yesterday the parties agreed that the issue of title, which is an issue of boundaries, concerns only the interpretation of the language of the grants "Around the head of Waihanau and Waialeia Valleys" and does not concern the boundaries, which are assured by traverse, on the boundary of Kamiloloa, Kaunakakai, and Kalamaula or the boundaries of Waialeia Valley or Waikolu Valley, which have never been questioned, but simply the boundary of the area shown on the maps and in the answer of the Territory as being approximately 50 acres lying above Waihanau Falls.

The Court: That is that portion delineated in green in the exhibit attached to the answer?

Mr. Cass: Yes.

Mr. Flynn: Yes, your Honor.

Mr. Cass: Is that your understanding of the issues?

Mr. Flynn: Yes.

The Court: Very well. Let that stipulation and the offer be approved and entered of record.

* * * * *

Mr. Cass: This land comprises a lele of the Ahupuaa of Kahanui. The history of the land is

that the land was awarded as a Mahele award in 1848, the Mahale award being Award No. 48. Later the [4] land by name was awarded under Land Commission Award 7755 and one-half of the land of the Ahupuaa of Kahanui. Rudolph W. Meyer, from whom title descends in this matter, bought a one-half interest in the Ahuputaa of Kahanui by name and occupied this land for many years.

In 1885 Mr. Monsarrat, a surveyor for the Government who then was engaged in surveying by traverse the lines now accepted as the southern and western boundaries of this land, to fix the boundaries of the lands which border this. He was not surveying Kahanui but was surveying the lands that border it to fix their boundaries.

Meyer was then in occupancy of the land and had been for many years. He was informed by Monsarrat and Mr. Alexander, Mr. Monsarrat's superior in the Land Office, that by some error or some reason this lele of Kahanui was not shown in the Government records as being part of the patent issued on Land Commission Award 7755. That apparently was the first information that he had that the land which he was occupying and which he had bought by name was not covered in the patent.

In 1886 Monsarrat prepared a description of this land, which Meyer attached to an application in a series of letters to the Government for a patent award or the privilege of purchasing all land which he occupied. He first made his application in 1888. And accordingly, in his letter he made an application to purchase the land "Which I now occupy

and which I believed was mine" for \$500. Whereupon, the Government advertised the sale of this lele by name only and sold it to Meyer for \$500. Thereafter a patent was drawn up in the language of Monsarrat's survey, which proved to be inaccurate in names. Monsarrat's [5] survey did not differentiate between the Valley of Waihanau and the Makaanalua boundaries. Meyer returned the grant for correction and that first patent was thereupon cancelled and a new patent embodying the names that Meyer had suggested was issued.

Sometime later, when Meyer received the new patent, he found that a section of the land itself was not shown in the sketch attached to the patent. The language "Around the head of the valleys" would have been broad enough to have covered this new parcel of land if it had not been that the sketch attached clearly did not show this projection out into the flat lands. Again he wrote to the Government. And the Government admitted that the land in this projection out into the flat land should have been included because it was intended to sell the whole of the lele of Kahanui to Meyer, and said, however, that the original grant could not now be corrected to include this particular land because they interpreted the law to be that it would not allow the Minister of Interior to change a grant which had been made under survey and map, but offered to sell to Meyer the additional land for \$10. Meyer sent his \$10 in and was issued a grant. Before he was issued a grant again the boundaries to the new grant came up.

Monsarrat was not available in the office of the Land Commissioner and J. D. Brown, known as Jake Brown, was in charge of the survey department and knew nothing at all about the boundaries, according to his letter. However, Monsarrat finished a survey line from some map of his, from which he said Meyer could get a rough estimate of the length of the spur and the description of the land. Jake Brown wrote a letter saying [6] that he would come to Molokai on a shooting trip and he would bring along a surveying instrument and get a better description. He did come to Molokai, but it was raining. There may have been other reasons why he did not do it, but he never set foot on the land of Kahanui or made any survey whatsoever. They simply took this straight line that Monsarrat had furnished for purposes of other distances, with the point projected into the land and issued a patent in which they patented the line only, not the area on top of the ridge but a straight line following that line out.

When the patent had been issued and came to the attention of Brown again, he wrote a letter acknowledging the mistake and setting forth the description which he had furnished the Land Office, which was a description "Around the edge of the pali," a piece of land of which this line was the center. He estimated the area at 20 acres. The actual area was 200 acres. This never was incorporated in a new grant but the letter of Brown correcting the patent has been used as delineating the boundary of that land, which now is not in dispute.

The land below this, the land of Makanalua, was also a Mahele award. It was an award to Haalelea. He was of the family of royalty. When the lepers were first to be placed on the land it was thought that leprosy would be stamped out in just a few years, and Haalelea offered this land of his, together with the lands of Kalaupapa and Waikolu for a leper settlement. It was agreed by the medical men that if they took the lepers over there and let them die off there would be no more leprosy in Hawaii. That happened in about 1860. I am not sure of that particular date. But in 1866 Haalelea's administrator [7] deeded the land of Makanalua to the Government by deed, and the Government's title to the land of Makanalua along which the disputed boundary line runs, as far as their title to the Makanalua land goes is based upon the deed of Haalelea's administrator to the King.

Meyer himself was a surveyor for the Board of Education for school lands. He was Land Commissioner for the island of Molokai, he was attorney in fact for Haalelea, he was attorney in fact for Princess Ruth, who was predecessor of the Bishop Estate; he was also business manager for the Leper Settlement.

In 1883 he got a deed for this half of the Ahupuaa of Kahanui from the secondary awardee by its ancient boundaries. The other half of the Ahupuaa of Kahanui belonged to the Princess Ruth and from the Princess Ruth came to her niece Pauahi Bishop. In 1884 he bought that other half of the

land from Bernice Pauahi Bishop, becoming the sole owner of this land. [8]

* * * * *

Mr. Flynn: The principal point which the Government has taken ever since the very extensive litigation in various phases was [12] begun has been that the lands involved here were conveyed or given to the applicant's predecessor by grant, by map and description, the grant being by map and description.

Our principal point of law is that where the grant is made by map and description and where the map and description may be reconciled with each other and reconciled on the ground and reconciled from all other data available to assist the parties in determining their rights, those are controlling and cannot be rejected except by clear, unequivocal and incontrovertible evidence. And we expect little or no difficulty in showing that the survey of the lands described in the first grant are adequate to bring the boundary line to where it always was as far as the Government was concerned, and that the survey of the second grant, an admittedly inadequate survey, still would not have bearing on the 50 odd acre parcel of land which is in dispute here. [13]

* * * * *

BERNARD H. McKEAGUE

a witness called by and on behalf of the applicant, being first sworn, was examined and testified as follows:

(Testimony of Bernard H. McKeague.)

Direct Examination

* * * * *

Q. (By Mr. Cass): What is your profession?

A. Registered professional surveyor.

Q. How long have you been a registered professional surveyor?

A. Sixteen years.

Q. Do you speak Hawaiian?

A. No, but I understand it fairly well.

Q. What has been your experience in surveying boundary lines in Hawaii?

A. I started in 1925 with the Bishop Estate and had experience in other offices, later, about eleven years, with Mr. Mann, and then since 1941 in business for myself, during all this time doing surveying work of the old boundaries, including ahupuaas [16] and kuleanas.

Q. In connection with your surveys, Mr. McKeague, how do you determine the lines which you are to run on an old boundary?

A. If it is an ahupuaa, kamaaina evidence together with the old description, if any. These boundaries usually follow definite topographic features.

Q. Did you prepare the map accompanying the application in this matter?

A. I did.

Q. What did you do in connection with locating on the ground the boundaries of this land?

A. That is, Kahanui 3?

Q. Yes. You may go over and point on the map, if you wish.

A. Yes. My principal work on the ground was

(Testimony of Bernard H. McKeague.)

in the vicinity of the disputed area, that is, from this rock marked with a cross, which is Monsarrat's point X, over and around to this point Y, across the gulch to where his point "Ridge A" was and northerly to a portion of the area, the flat area covered under Grant 3539 to R. W. Meyers, and back across the Big Fall to Monsarrat's point X.

Q. Did you actually go on the pali around to take your shots, all the way around that northern boundary?

A. No, I did not. On Monsarrat's "Ridge A" I located the boundary for probably a thousand feet and then on the point "Monsarrat's Dry Tree" I located the edge of the pali for about another thousand feet northward.

Mr. Flynn: Excuse me. I did not get that.

(The answer was read by the reporter.)

Mr. Flynn: May I ask you to point out again on the map, [17] please?

A. That is where I plotted the point to identify the position as it pertains to my map. For other points I probably can use an X circled here near the bearing 353 degrees 43 minutes as being the northerly limits of my locating the top edge of the pali on the Waialeia side and probably the same at the end of cross 127 degrees 40 minutes.

Q. (By Mr. Cass): I note that the map you are pointing to there has red lines and figures on it. Do those appear on the map that is on file?

A. It does not.

(Testimony of Bernard H. McKeague.)

Q. What do those lines and figures represent?

A. They represent the shots that Monsarrat took from these established points on the Kalamaula boundary and some of the points along the Waikolu boundary.

Q. They are identified, as you have mentioned, as "Point A," "Dry Tree," and so forth, written onto your map?

A. That is right.

Mr. Cass: May we offer that map in evidence?

The Court: Any objection?

Mr. Flynn: No objection, your Honor.

The Court: It will become Applicant's Exhibit A in evidence.

(The map referred to was received in evidence as Applicant's Exhibit A.)

Q. (By Mr. Cass): Now, in determining the boundary of this land, did you refer to the patent?

A. I did not. Where it pertains to the northerly—the northerly boundary? [18]

Q. Did you read the patent?

A. I did.

Mr. Cass: The patent is already in the abstract, if the Court please. I offer a photostat copy of Patent 3437. That is the same one that was in evidence before, although the certificate may have been lost on it.

Mr. Flynn: The clerk's notes from the 1936

(Testimony of Bernard H. McKeague.)

trial are here. I have no objection, your Honor.

The Court: It will become Applicant's Exhibit B in evidence, Patent No. 3437, a photostatic copy thereof.

(The photostatic copy of Patent No. 3437 was received in evidence as Applicant's Exhibit B.) [19]

* * * * *

Q. (By Mr. Cass): Now, Mr. McKeague, reading from the exhibit which is in evidence, the grant reads, as Course No. 4, "North 37 degrees 56 minutes west 2854 feet along Kalamaula to a stone marked with a cross at the edge of the Waihanau Valley, thence around the head of the Waihanau and Waialeia Valleys to the Government Survey Station 'Kaluahauoni,' the direct bearing and distance being 79 degrees 07 minutes east (true) 8631 feet."

Did you identify the boundary described thusly before you put it on your map?

A. What was that question again?

Q. Did you take your boundary off of the grant here and identify it on the ground?

A. In determining the northerly boundary as it pertains to that fourth course, "thence around the head of the Waihanau [20] Valley and Waialeia Valley," I further explored the meaning of that and decided and determined that the boundary, that it meant that it went from this point, this cross on

(Testimony of Bernard H. McKeague.)

a rock, around the top edge of this gulch overlooking Waihanau Valley, across Big Fall, to the upper edge, and northeasterly from Big Fall, thence around the westerly edge of Waihanau Valley, around Hoalae Point, still following the top edge of the pali, along the westerly side of Waialeia Valley and around the head of Waialeia Valley to the point Kaluahauoni.

Q. How did you come to that conclusion? What evidence did you have or obtain as to the location of that line on the ground?

A. There were letters in correspondence between Meyer and Government officials, corrections in the original patents, to show the intent of what was intended to be conveyed in the original application by Meyer.

Mr. Flynn: If the Court please, I want to make a slight interruption. Although he is entitled to testify from conclusions, from the examination of correspondence and other documents, I believe properly the applicant must be required to have those in evidence as the best evidence themselves and then the witness will be allowed to draw his conclusions from them and point specifically to what he refers to as bases for his conclusions. Mr. Cass, are you now offering this? [21] * * * * *

Mr. Cass: This letter to Thurston, July 4, 1888, the response of Thurston, July 27, 1888, to Meyer, or rather a letter from J. F. Brown to Thurston, July 27, 1888, reporting on the application, the formal application of Meyer to purchase the land for

(Testimony of Bernard H. McKeague.)

\$500, dated the 31st of August, 1888, accompanied by a description of survey. I offer those in evidence.

The Court: Any objection?

Mr. Flynn: No objection.

The Court: Very well. Let all be marked Exhibit C of the applicant. The letter from Meyer to Thurston, dated July 4, 1888, Exhibit C-1; the letter of Brown to Thurston, July 27, 1888, C-2; the application and accompanying description of survey, dated August 31, 1888, C-3. In evidence.

(Applicant's Exhibits C-1, C-2, and C-3 were received in evidence.) [22]

* * * * *

Mr. Cass: It may help in reference. I am reading from the typed copy of the letter of Meyer, dated July 4, 1888.

(Reading.) * * * * * [23]

Then, following that, on July 27, 1888, J. F. Brown reported to Thurston: (Reading.) [25]

* * * * *

Then Meyers writes again to Thurston, on the 31st of August, 1888. (Reading.)

* * * * *

Those are the letters contained in the file. This blueprint, however, has in addition to the letters, the survey mentioned. [26]

* * * * *

Mr. Flynn: It is the three documents. I had thought it was only the one. So that you can let

(Testimony of Bernard H. McKeague.)

the record note that C-1-A is the typewritten copy of all three letters referred to in Exhibit C.

The Court: Very well. Let the record so show. Exhibit C-1-A.

Mr. Flynn: Thank you.

The Court: Will then become C-1-A, B, and C, of the applicant. That is the typewritten copy.

(Applicant's Exhibits C-1-A, B, and C, were received in evidence.) [27]

* * * * *

The Court: Let the photostat of the advertisement of October 4, 1888, in the Daily Pacific Commercial Advertiser become Exhibit D-1 of the applicant, in evidence; the news item, dated October 11, 1888, becomes D-2 in evidence.

(The documents referred to were received in evidence as Applicant's Exhibits D-1 and D-2.)

* * * * *

The Court: Letter dated July 31, 1888, from the Department of Interior to R. W. Meyers, becomes Applicant's Exhibit E in evidence.

(The document referred to was marked Applicant's Exhibit E and was received in evidence.) [28]

* * * * *

The Court: Letter of August 6, 1888, Depart-

(Testimony of Bernard H. McKeague.)

ment of Interior to Meyer, will become Applicant's Exhibit F in evidence.

(The document referred to was marked Applicant's Exhibit F and was received in evidence.)

* * * * *

The Court: It will become Applicant's Exhibit G in evidence, letter from Thurston to Meyer, dated August 30, 1889.

(The document referred to was marked Applicant's Exhibit G and was received in evidence.) [29]

* * * * *

The Court: The letter of the Department of Interior to Meyer, dated October 17, 1889, becomes Applicant's Exhibit H in evidence.

(The document referred to was marked Applicant's Exhibit H and was received in evidence.)

* * * * *

The Court: Very well. Let the letter of Brown to Thurston, dated November 12, 1889, become Applicant's Exhibit I-1.

Mr. Cass: And the letter of Meyer to Thurston, dated October 23, 1889—

The Court: Will become Exhibit I-2 of the applicant's in evidence. [30]

Mr. Flynn: You have those two in reverse order,

(Testimony of Bernard H. McKeague.)

but that does not make any difference. That does not matter.

(The documents referred to were marked Applicant's Exhibits I-1 and I-2 and were received in evidence.)

Mr. Cass: Now I offer in evidence a photostatic copy of the original grant, not for the purpose of establishing boundaries by the original grant but because the original grant has corrections made in the handwriting of Meyer, I believe. The original grant is corrected to change the names of the Waihanau Valley and the name of Waialeia Valley is substituted for that of Makanalua in that fourth course. Is there any objection to that?

Mr. Flynn: No objection. I might call the Court's attention to the fact that the handwriting referred to by Mr. Cass is extremely indistinct on this copy but we will probably be able to agree as to the exact wording of it.

Mr. Cass: Yes.

The Court: Is that offered for the purpose of the corrections noted on the photostat, limited to that solely?

Mr. Cass: That is for that purpose only.

The Court: It will become Applicant's Exhibit J in evidence.

(The document referred to was marked Applicant's Exhibit J and was received in evidence. * * * * * [31])

(Testimony of Bernard H. McKeague.)

The Court: Photostatic copy of original Grant 3539 becomes Applicant's Exhibit K in evidence.

(The document referred to was marked Applicant's Exhibit K and was received in evidence.)

Mr. Cass: I offer in evidence the letter from J. F. Brown, Hawaiian Government Survey Office, dated May 22, 1891, with the inscription "Signed by Brown" attached.

* * * * *

(The document referred to above was marked Applicant's Exhibit L and was received in evidence.)

Q. (By Mr. Cass): Now, Mr. McKeague, you have heard the description of the letters that I have read and have sat here and seen the letters themselves as I passed them in for entry into evidence in this case, as exhibits. Are those the letters which you examined when you made up your mind where the boundary of the land was supposed to run?

A. That is right.

Q. Did you make any other effort to locate on the ground where the survey lines should run by way of gaining information from other sources? [32]

A. I made inquiries with the kamaainas and I was informed that they all knew the boundary to run along the Big Fall.

Mr. Flynn: If the Court please, I am going to

(Testimony of Bernard H. McKeague.)

make an objection to that answer as not being strictly responsive to the question but primarily because the conclusion is expressed by the witness that he made inquiry of kamaainas, whereas I believe the Court could take judicial notice that kamaainas have been particularly extinct since 1912, according to a number of Supreme Court decisions, and I move to strike that portion of the witness' answer wherein the witness states he found from kamaainas where the boundaries were. * * * * *

The Court: The objection is sustained. The portion of the answer objected to will be stricken. For the record also, let the record show that Mr. Flynn's original objection—now that these other exhibits are in evidence—is overruled.

Q. (By Mr. Cass): Having talked to kamaainas and examined letters and the grant, as you stated, where did you place the boundary of the disputed area between Makanalua and Kahanui?

Mr. Flynn: Objection, if the Court please, to that portion of the question calling for the witness' referral to his talk to kamaainas, when that has just been stricken [33] by the Court:

The Court: The objection is sustained.

Mr. Cass: If the Court please, what he told them is sustained—is objectionable, but the fact that he actually obtained knowledge from them is very similar to the proposition that a policeman cannot relate what was told him in a confession but he can tell what he found as a result of that confession.

(Testimony of Bernard H. McKeague.)

The Court: That is not the form of the question, Mr. Cass. Perhaps it can be rephrased.

* * * * *

Q. (By Mr. Cass): Well, whom did you talk to, Mr. McKeague, that you considered kamaainas?

A. Willie Meyer, who is about sixty-four years old, a member of the Meyer family, who in turn was a little boy, and the boundary was pointed out to him by his grandfather; two daughters of the original Rudolph Meyer, Aunty Pearl and another member of the family who is about eighty-seven years [34] old; and there was a kid there, Penny Meyer, who roamed those hills in the early days with the older folks, and he also said that the boundary——

Mr. Flynn: Wait a minute. May I interrupt, please?

A. (continuing): ——was at the Big Fall.

Mr. Flynn: May I interrupt the answer, if the Court please? I submit this is not admissible. If those individuals are capable of giving kamaaina testimony, they must be present in court for cross-examination and cannot be brought in this way. I submit further that the Supreme Court in the late 1890s and again about 1912 indicated that kamaaina testimony within the meaning of that term as used many years ago, even when land commission awards were involved, is not the type of testimony offered now. [35]

* * * * *

Mr. Flynn: If the Court please, at the time of the recess I had just made an objection to the na-

(Testimony of Bernard H. McKeague.)

ture of the questioning by counsel for the applicant, the purpose of which was to bring forth from the witness, who is a surveyor, that he contacted kamaainas for information, and I objected on the ground that kamaaina testimony has a specific and limited meaning in Hawaiian land law, and on the further ground that if there are any qualified kamaainas or were at the time of this witness' work that their own testimony would be the best evidence of this matter, and I objected further on the ground that the decisions of our own Supreme Court many years ago specifically refer to the nature of kamaaina testimony and in their references and discussions have disclosed that the type of limited testimony is that which was then available from original Hawaiians or those who were in existence on the lands and whose business it was to know the lands in the various divisions and subdivisions of the lands in the Territory, specifically ahupuaas and other subdivisions.

(The Court thereupon heard the argument of counsel upon the objection.)

The Court: The question that brought forth the objection was what people Mr. McKeague had contacted. He thereupon started to testify as to what certain individuals had told [36] him and thereupon Mr. Flynn objected.

Mr. Cass: I will withdraw that testimony and permit it to be stricken, and I will ask Mr. McKeague this.

Q. (By Mr. Cass): Now, Mr. McKeague, you

(Testimony of Bernard H. McKeague.)

testified that you had talked to kamaainas. Is this survey an expression of what those kamaainas told you where the boundaries run?

Mr. Flynn: My objection is a little bit more specific.

The Court: I would think, for the record, Mr. Flynn, that now is the time for the objection formerly made.

Mr. Flynn: Then I will renew the objection that I formerly made, together with the argument in support of the objection.

The Court: The objection is overruled.

Mr. Flynn: May I save an exception, please, your Honor?

The Court: An exception may be noted. [37]

* * * * *

The Court: Let the blueprint of the map attached to the application become Applicant's Exhibit M in evidence.

(The map referred to was marked Applicant's Exhibit M and was received in evidence.)

Q. (By Mr. Cass): Now, go ahead, Mr. McKeague, and from this map explain how you reached those boundaries.

A. In determining the boundary along the northernly side of this application, in running from this point, this cross in rock, following around the head of the Waihanau Valley, through Big Falls, which is known as Kaulahuki and up along the easterly

(Testimony of Bernard H. McKeague.)

side of Waihanau and back around Hoalae to Kalawao, on the westerly side of Waialeia Valley and around the head of Waialeia Valley to the trig station Kalauhauoni was determined by all the evidence that I could get, including the kamaainas, the commission's letters that were submitted in evidence, related maps, descriptions, and notations that were made on the original application as to the boundary running around the—the notation that was made at the foot of the original patent, [38] thence around the head of Waihanau Valley, following the pali to Kalawao and around Waihanau Valley to the Government triangulation station," I took that to mean around the head or around Kalawao Valley and around the Waialeia Valley to the Government survey station.

Mr. Cass: I would like the record to show that the witness in indicating the boundary line followed the boundary shown upon the blueprint map up there as presented by the applicant.

The Court: The record may so show. [39]

* * * * *

Q. (By Mr. Cass): Have you prepared an elevation chart showing the elevations of the land coming up Waihanau Valley, up the Fall and up to the disputed boundary of the Government?

A. Yes, I have prepared a profile.

* * * * *

(The map referred to was received in evidence as Applicant's Exhibit N.) [40]

* * * * *

(Testimony of Bernard H. McKeague.)

Q. Now, will you show us where the Big Fall is on your profile?

A. The Big Fall is indicated on this map as 5 plus 80, elevation 2200, top of Kaulahuki or Big Fall.

Q. That, I notice on your sketch map, is broken into apparently two falls. Is that what is known as the Big Fall in both sections or is there a separate name for each section?

A. I have labeled the one section by the two names, Kaulahuki and Big Fall.

Q. Where did you get those names?

A. The name "Kaulahuki" was shown on some registered maps and by the description in W. H. P. survey of the land of Makanalua.

Q. You place Kaulahuki at that point, from those two?

A. Yes, I did. [41]

* * * * *

Mr. Flynn: May I ask once again, if the Court please, to have the witness clarify that and refer again to the points? I have difficulty following this.

A. I will start from the bottom of the Waihanau Valley or floor, at 2,000 feet. The first rise is 2,117 feet—117 feet. And that is at a point 15 feet from the lower point. Then the next rise is 83 feet to 5 plus 80, the elevation being 2,200 feet up to the top of Kaulahuki or Big Fall.

Q. (By Mr. Cass): Now, did you measure the height of the fall at the point where the Government survey line crosses the stream? There is a waterfall there, is there not?

(Testimony of Bernard H. McKeague.)

A. Referring to the fall at Waiau?

Q. Yes.

A. That elevation was measured by the Territorial Survey Office and I applied those elevations to this profile.

Q. And what does the Territorial Survey Office plot that as? [42]

A. At 29 plus 0 the elevation is 2,385.

Q. How much is the Fall itself?

A. About 25 feet.

Q. About 25 feet. Have you ever gone up that Waiau Fall?

A. No. I stepped over the Fall, but I couldn't get down to it. I had to go around it to get under it.

* * * * *

Cross Examination

Q. (By Mr. Flynn): Mr. McKeague, you have stated in general terms that you referred to the old correspondence which is now in evidence here as giving you information as to where this northern boundary of Kahanui is located. May I say first the northern boundary of Grant 3437. Is that correct?

A. I believe my answer was "Government information as to the intent of where that boundary should be under the application made by Meyer for the land that was desired."

Q. Will you please refer specifically as to where in those documents you find evidence of the intent?

A. The first thing I tried to do as far as that description that refers "to the head of Waihanau and Waialeia Valleys" is to explore everything that

(Testimony of Bernard H. McKeague.)

is in connection with that course. In the original patent 3437, at the bottom it said—they had in pencil “thence around the head of Waihanau Valley, around the pali to Kalawao and around the Waialeia Valley” gave me the first clue as to the intent. Then the letters just supplemented my belief that Monsarrat did not survey the [43] land of Kahanui 3—rather than the land of Kamolo, Kaunakakai. Also, the description which he prepared was prepared before the grant was made and was not intended to convey the land that was applied for by Mr. Meyer. In one of the letters from Mr. Monsarrat to Mr. Meyer, when he was in Pukoo, he admitted that the lands on either side belonged to the Government, that it made no difference in his mind where that line went, but it did make a lot of difference as far as Mr. Meyer was concerned where the boundary of his application went. Following the ancient boundaries, which, interpreting his notation that he made on the original patent, went around the head of the valley, along the lines that I have accepted as the boundary as intended to be conveyed.

Q. (By Mr. Flynn): You say in one of the letters from Monsarrat to Mr. Meyer?

A. That is right.

Mr. Flynn: Is that letter in evidence? I don't believe it is, if the Court please. I am sorry to interrupt again. [44]

* * * * *

(Testimony of Bernard H. McKeague.)

Mr. Cass: It has not been offered. I don't believe it is marked in this case.

* * * * *

The Court: It will become Applicant's Exhibit O in evidence. Letter from M. D. Monsarrat to Mr. Meyer, dated June 25, 1890.

(The letter referred to was marked Applicant's Exhibit O and was received in evidence.)

* * * * * [45]

The Court: Letter from the Department of Interior to Mr. Meyer, dated November 22, 1889, becomes Applicant's Exhibit P in evidence.

Mr. Cass: That is the one in which he says he is going to take a surveying instrument along.

Mr. Flynn: I have no objection to this. Are you offering it, Mr. Cass?

Mr. Cass: Yes.

The Court: Letter dated July 15, 1890, from Brown to Meyer, becomes Applicant's Exhibit Q in evidence.

(The documents above referred to were marked Applicant's Exhibits P and Q and were received in evidence.)

Mr. Cass: Now, I have here a copy of an affidavit of A. Mauritz, which is found in the file of Law Number 14859. I have asked the clerk for a certified copy and will replace [46] it with a certi-

(Testimony of Bernard H. McKeague.)

fied copy as soon as the clerk can prepare such a copy. They could not find the file. And I offer in evidence this copy, subject to later check and verification of the contents and signature. We will withdraw it if it cannot be sustained, although I know it can. This is a carbon copy of the record of the Supreme Court.

Mr. Flynn: I will object to this offer, your Honor. [47]

* * * * *

Mr. Flynn: I will stipulate to the death but will ask the Court for a brief delay until I check that statute and I ask that I be permitted further argument on that.

The Court: Let it be marked "R" for identification".

(The document referred to was marked Applicant's Exhibit R for identification.) [48]

* * * * *

Q. (By Mr. Flynn): Now, I will ask the witness to examine this letter of 1890, from Monsarrat to Meyer, and restate what conclusion, if such it was, that you drew from it?

A. The conclusion that I got from the letter was that the matter refers to the description of a survey made by Pease, wherein he quotes, "Following always a stonewall separating this land from the land called Pohakuloa, thence south 12 degrees 0 minutes east 15 chains and thence to the top of the mountain ridge called Hoalae, then following along the top of the pali bounding Makanalua Gulch or ravine on its

(Testimony of Bernard H. McKeague.)

easterly side to a certain mountain peak," which in Pease's description called it—he calls it Kaulahuki also.

Q. Mr. McKeague, you are reading now from your own notation, are you not, rather than from this letter of 1890?

The Court: Exhibit O.

A. That is right. I can read from the letter also. It is from my notes. I can read it from the letter also.

(Reading from Exhibit O.) [49]

* * * * *

Q. May we refer to your first map that you presented in evidence today? A. This blueprint?

Q. No. I believe you called it your work sheet.

A. Yes.

Q. Exhibit A. On the basis of your knowledge derived from the several letters and pieces of correspondence between Mr. Meyer and the government officials and also this letter from Mr. Monsarrat to Mr. Meyer, which is Exhibit O, is it not correct to state that the land referred to in this letter of June 25, 1890, from Mr. Monsarrat to Mr. Meyer, was only that covered by this ridge shown on your map as Grant 3539 to R. W. Meyer?

A. My conclusion is the opposite one of all the letters and does not necessarily refer to the specific letter.

Q. May I call your attention to your own map, which shows this ridge as Grant 3539 to R. W. Meyer?

A. What is the question again?

(Testimony of Bernard H. McKeague.)

Q. I am just calling your attention to it.

A. Yes. [50]

Q. Now I want to ask you, wasn't this ridge the land constituting the Grant No. 3539?

A. It comes by the supposed description of this finger of land here. It starts from Monsarrat's point A, which I marked "Portion of 3539" to our mark and includes this piece here.

Q. This grant was issued in 1891, was it not?

A. That is my recollection.

Q. This grant did not purport to convey any land that was contained in Grant 3437, did it?

A. It was intended to convey the balance of the land that Mr. Meyer applied for and did not get.

* * * * * [51]

Q. At no time in the correspondence did Grant 3539 become described as including any land which had previously been conveyed under Grant 3437, is that correct?

A. That is my understanding.

Q. And the description in Grant 3539, together with the more corrected description shown in the various government records in evidence, still do not show Grant 3539 as including any of the lands intended to be in Grant 3437, is that correct?

A. That is right.

Q. So Grant 3539 was a separate grant of a separate piece of land, was it not?

A. That is right.

Q. And Grant 3539 by both the description in the grant and by the more accurate or more comprehensive description that should have been made

(Testimony of Bernard H. McKeague.)

in the grant touched Grant 3437 at only one point.

Is that not correct?

A. That is right.

* * * * *

Q. (By Mr. Flynn): And continuing, Mr. McKeague, with where we were at the recess, I will show you Applicant's Exhibit L, which is a letter addressed to Mr. R. W. Meyer, May 22, 1891, signed by J. F. Brown, Government Survey Office, and included as an extra page a description of a portion of Government land Kahanui, Molokai, and ask you if you have seen this before?

A. Yes, I have.

Q. Did you consider this in doing your work and this surveying problem along with the other materials we have discussed?

A. I have.

Q. Calling your attention to the description of "Portion of Government land Kahanui, Molokai," which reads as follows: "That tract of land lying on the top of the ridge between the Waihanau and Waialeia Valleys, and bounded by the upper edge of the palis of these valleys, the center line of this ridge being described as follows: Beginning at a point on the northern boundary of Grand 3437 to R. W. Meyer, this point bearing south 56 degrees 10 minutes east true, distant 5180 feet from station on 'Kaohu,' thence by true bearings," and so forth. "Beginning at a point on the northerly boundary of Grant 3437" is where you have marked "M. D. M's ridge A", is it not?

A. That is it.

Q. That is the beginning description of that tract of land as shown in this description? [55]

A. According to that description, that is right.

(Testimony of Bernard H. McKeague.)

Q. And then it reads: "That tract of land lying on the top of the ridge between the Waihanau and Waialeia Valleys, and bounded by the upper edge of the palis of these valleys." According to this description, then, Mr. McKeague, beginning from ridge point A there is only the Waihanau Valley on the westerly side of that line, is there not?

A. That is according to the description.

Q. And you agree, then, do you not, that no part of Grant 3437 was mentioned in this description except that single beginning point?

A. That is right.

Q. Then do you not agree that Grant 3539, either by the actual description in the grant or by the more appropriate description in the records of the Government Survey and Land Offices was not intended to include any portion of the Land previously described as being in Grant 3437?

A. That is my understanding.

Q. Now, the matters we have already discussed show that Grant 3437 was issued in its final form in October 1889; Grant 3539, this ridge, was issued in 1891. Correct?

A. That is right.

Q. Then, is there anything in the grants themselves or the descriptions to show that Grant 3539 was issued on a portion of Grant 3437? [56]

* * * * *

A. There is not. [57]

* * * * *

Mr. Flynn: This may be slightly premature, your Honor, but I think it is appropriate to bring

(Testimony of Bernard H. McKeague.)

it into the record at this time. I will move the Court to make a ruling denying as admissible for registration the portion of the description which contains the words, following the words "Grant 3539 and R. W. Meyers," the words, "On a portion of Grant 3437 to R. W. Meyer," as being contrary to law and as being contrary to the legal evidence now before the Court.

The Court: The question is premature. It will be denied at this time.

Q. (By Mr. Flynn): Mr. McKeague, we might leave Grant 3539 for the time being and return to Grant 3437. I believe your earlier testimony showed, and as exemplified in this map, which is Exhibit A, that you examined the field notes of the surveyor M. Douglas Monsarrat. Is that correct?

A. That is right.

Q. And from those notes you made many of those plottings as shown in red on your map?

A. That is right.

Q. Will you state which field notes you examined, or do you recall?

A. I have photostat copies of the notes. From Government survey field book No. 359. [62]

Q. Can you give just the pages?

A. Pages 110, 111, 112, 113, 114, 125, 126, 129, 130, 131, 132, 133, 134, 141, 142.

Mr. Flynn: You haven't offered these in evidence, Mr. Cass?

Mr. Cass: No.

Mr. Flynn: I would like to offer in evidence as

(Testimony of Bernard H. McKeague.)

Territory's Exhibit 1 the field notes just referred to by the witness as being a basis for his compilations shown on Exhibit A.

Mr. Cass: We object, if the Court please. [63]
* * * * *

The Court: Why not put that question to the witness and ask him if he did use the notes for the computation of the boundary.

Q. (By Mr. Flynn): Did you use these notes in your work to ascertain the boundaries in dispute, Mr. McKeague? A. I did not.

Q. You did not even examine them to see where they went to?

A. I examined the notes and plotted the notes to see where it lies on the ground, exactly on the ground.

Q. Haven't you testified that you also examined maps of Monsarrat?

A. Not in this area, that he prepared. [65]

* * * * *

Q. (By Mr. Flynn): I was asking you, Mr. McKeague, about these field notes, and you enumerated them and have handed them to me. You have enumerated the pages which you did examine to establish the various points shown on your map. Correct? A. That is right.

Q. Now, I will refer you to M. D. M's ridge point A that is shown on the field notes.

A. By the——

Q. (interrupting): If it is shown on the field notes——

(Testimony of Bernard H. McKeague.)

The Court: Let the witness explain his answer, if any.

A. This M. D. M. ridge point A was completed from observations [66] made from M. D. M's point Y and M. D. M's Kauna Gulch, the location of which I wanted to know.

Q. Did you check this ridge point A on the ground? A. I did not.

Q. Did you check it from any work that you did? A. I did not.

Q. So you accepted M. D. M's ridge Point A as accurate? A. By plotting, I did.

Q. And M. D. M's ridge point A you have previously shown is the beginning point of the description of Grant 3539. Isn't that so?

A. I did not come to that conclusion.

Q. The beginning point of Grant 3539 calls for, in its description, this point A, does it not?

A. That is right.

Q. Now, M. D. M's X, which is Monsarrat's X, you have marked down at this extreme northwesterly corner of Grant 3437. Correct?

A. That is right.

Q. Did you note there——

Mr. Cass: That is southwesterly, isn't it?

A. Northwest.

Mr. Cass: All right.

Q. (By Mr. Flynn): Did you note there the field notes of Monsarrat occupy Point X?

A. That is right.

Q. And from there he took various shots to

(Testimony of Bernard H. McKeague.)

other points, did he not? A. That is right.

* * * * *

Q. Monsarrat did take a sight from his Point X to Kaluahauoni Triangulation Station, did he not?

A. That observation indicated on the map is 280 degrees and 49 minutes.

Q. It is the observation I ask you about, is it not? A. Yes.

Q. Now, that point is the one referred to—I am sorry—that sight is the one referred to in the description of Apana 3 of Kahanui, Grant 3437?

A. I don't recall because I wasn't interested in the sights as pertains to the grant.

Q. I am referring to Grant 3437. I call your attention to the first page of applicant's Exhibit B, a photostat copy of Grant 3437, at the bottom of which there is a course reading "North 37 degrees 56 minutes west 2854 feet along Kalamaula to a stone marked with a cross at the edge of the Waihanau Valley"; can you not identify that as M. D. M's Point X?

A. The end of the course you just read, that is right.

Q. The next course after the one I just read reads: "Thence around the head of the Waihanau and Waialeia Valleys to the Government Survey Station 'Kaluahauoni,' the direct bearing [68] and distance being south 79 degrees 07 minutes east true 8631 feet."

Does that not refer to this bearing we were

(Testimony of Bernard H. McKeague.)

just talking about a minute ago, going from Point X to Kaluahauonia Triangulation Station?

A. That is possible but this does not jibe with the patent. The distance is not shown on this map.

Q. Did you endeavor to check this distance?

A. I did not.

Q. And you say it does not jibe with the patent?

A. This line as I show it on the map does not indicate the distance and that bearing and distance as shown on the description of the patent is not shown on the map here. I don't recall whether they are identical or not.

Q. You have examined this patent to determine, both from dates and other sources, the intended description of the boundaries, have you not?

A. Not in its entirety for my purposes in establishing a boundary in this application.

Q. Did you endeavor to establish the boundary without regard to the patents?

A. Where it shows the intention of the conveyance under the patent I did, but values of the bearing and distance I did not.

Q. So you disregard in your survey here this entire patent? A. No.

Q. Are you disregarding portions of it?

A. No.

Q. If I understand your answer correctly, to what I asked you a minute ago, you said something to the effect that the [69] bearing and distance shown on the patent here does not correspond to the

(Testimony of Bernard H. McKeague.)

line you have drawn from Point X to the Kaluahauoni Triangulation Station.

A. That is right. For the simple reason I did not show the distance and the distance is shown on the patent.

Q. Can you show the distance now, if you have instruments?

A. It is quite possible if I have the computation.

Q. Can you do that if you have time?

A. I think we probably have it; I don't know.

Q. Why did you disregard this language in this patent: "The direct bearing and distance being south 79 degrees 07 minutes east (true) 8631 feet"?

A. Because that bearing and distance does not establish the boundary of the grant. The call distance around and so forth is what we are concerned with.

Q. Do you mean to say that as a surveyor in examining a grant you can take one part of a call and disregard the remainder of the same call?

A. No.

Q. But you did state you disregarded this language about "The direct bearing and distance being south 79 degrees 07 minutes east (true) 8631 feet," is that correct?

A. I disregarded the values but not the intent of the thing. They are two different things altogether.

Q. Did you regard this distance at all?

A. Offhand, as I said, I don't recall whether I did or not, because as far as I was concerned I was more concerned with the call "Beginning around

(Testimony of Bernard H. McKeague.)

the head of Waihanau and Waialeia Valleys." A direct bearing and distance, like many other [70] courses, is a meandering line, a direct line, and does not establish the boundaries.

Q. But this is a direct bearing and distance at least from Point X to Kaluahauoni Triangulation Station, is it not?

A. That is right. That is called for in the patent. That is right.

Q. Do I understand you, then, to say that you disregarded this distance matter because as long as you followed around what you thought was the head of the valley or what you interpreted to be the head of the valley, you found the distance to be off?

A. Because the bearing and distance was a direct line and the bearing and distance does not state the boundary,—the boundary can be broken up when it is a meandering line into four or five different courses. It is a mathematical thing to give a direct bearing distance between two points wherein the inbetween boundary is a meandering line.

* * * * *

Q. Don't you have to check out each point of the patent if you find it appropriate to disregard some point to point?

A. I have answered that question. [71]

* * * * *

Mr. Flynn: There was a question there a moment ago that I would like to have answered or

(Testimony of Bernard H. McKeague.)

rather repeated by the reporter, if the Court please.

(The question was read by the reporter.)

A. If the points are recognized on the ground and it ties in with the patent, we will use it. In this case the M. D. M's X on the ground marker, that cross on rock, is well established, the Kaluahauoni Trig Station at the end of what is supposed to be the course given in the patent is well established, the values in between are the changes slightly from the patent, [72] but along that line it connects up the call distance "Around the head of Waihanau and Waialeia Valleys" the direct bearing being such.

* * * * *

Q. If I read your writing properly here, Mr. McKeague, from X to Kaluahauoni Triangulation Station is 280 degrees 49 minutes. Am I correct?

A. That is right.

Q. The patent I have before me reads, "The direct bearing and distance being south 79 degrees 07 minutes." Is that a discrepancy?

A. About 4 minutes. He changed it to azimuths. That bearing should read "280 degrees 53 minutes."

Q. Very close, in other words? A. Yes.

* * * * * [73]

Q. Are there two different methods of computing this bearing?

A. Shall I say two different methods of presenting the direction of a line.

Q. All right. Can you tell me which two they are?

(Testimony of Bernard H. McKeague.)

A. One is near the segment from the south, in this case 39 degrees. No. 79 degrees and 7 minutes. That is southeast 79 degrees and 7 minutes is deducted from 360 degrees to arrive at an azimuth.

Q. So that comes very close then?

A. That is right.

Q. Thank you. I notice you have a point marked K. You found this in Monsarrat's field notes?

A. That is right.

Q. And you checked it out in what way?

A. All I did was plot it on this map.

Q. What is plotting? Will you just explain what that is that you did in this case?

A. By parallel ruler and protractor and starting from the point M. D. M's Kauna Gulch point and ruling off this azimuth 143 degrees, to this point R, which would be intersected by another sight from Kaluahauoni Trig Station by the azimuth [74] 97 degrees 22 minutes and by intersection from the Point R located on the map.

Q. You call that Point R?

A. K. I am sorry.

Q. It is Point K? A. K.

Q. Will you explain, and I hope this is not repetitious, how you examined Monsarrat's field notes and then examined his maps? I will withdraw that. Did you examine Monsarrat's map of 1886, on file in the survey office of the Government?

A. To the best of my knowledge there are no maps in connection with Kahanui as it pertains to this survey.

(Testimony of Bernard H. McKeague.)

Q. I mean Monsarrat's map of Molokai in 1886, on file in the Government Survey Office?

A. Yes, I have.

Q. You have examined it? A. Yes.

Q. Do you recall whether you examined a one thousand foot or two thousand foot map?

A. Offhand, I don't.

Q. Was it sometime ago, some months or years ago that you examined it?

A. Two or three years ago. Almost four years ago.

Q. Do you remember examining only one map of Molokai by Monsarrat or two or more maps?

A. I don't recall any number at all.

Q. You do recall looking at some map or maps of Molokai by Monsarrat, is that correct?

A. Very vaguely, yes. [75]

Q. Did you ever look at any of those maps where Apana 3 of Kahanui is drawn in?

A. I don't recall.

Q. You don't recall? A. No.

Q. You may have seen a map of Monsarrat's which included Apana 3 of Kahanui on Molokai?

A. That is possible; I don't recall.

Q. I rather thought that you did not use that at all in your surveying work for this Land Court registration, is that correct?

A. That is right.

Q. You used the grants themselves, is that right?

A. It helped me to determine certain phases of the land that was acquired by Meyer. [76]

(Testimony of Bernard H. McKeague.)

Q. What was your next step after examining the grants?

A. Going into all these letters, correspondence, maps, descriptions, in old maps.

Q. Will you please state what old maps there were that you went into?

A. They were in the survey office, certain registered maps. Some of the lands had been mapped by Surveyor Nahala and by Surveyor Pease.

Q. That was a map and description of what?

A. It was an old map.

Q. Of what?

A. The land of the lower part of Makanalua.

Q. I assumed you were going to proceed. You may, if you will. That is the first map or description you have discussed now aside from the grant.

A. The patent, the grants, the different letters in connection with the acquiring of the whole Kahanui 3, the boundary as surveyed by Monsarrat along Kalamaula, Kaunakakai, and Kamiloloa.

Q. I am going to interrupt the questioning, Mr. McKeague, because you refer to your examination of registered maps and other old maps. You have mentioned only one. I will ask you if you can tell me what others you have examined?

A. There was one by Monsarrat. I believe the registered [77] number is 1728.

* * * * *

Q. When you examined this first map you referred to as an old one of the lower section of

(Testimony of Bernard H. McKeague.)

Makanalua, did you make any notes about that for your own use?

A. In one or two cases, where it refers to Waihanau Valley and the Point Iliilika.

Q. Was that map or description of any use to you in arriving at your conclusions as to the boundaries of these lands?

A. Not for the boundary but the call of the name Waihanau, as to the location of Waihanau.

* * * * *

Q. You refer to Monsarrat's registered map No. 1728. Do you have any notes or data from your examination of that map?

A. I prepared a map using part of that information. I have a composite map here of all the data that I had wherein Monsarrat's data was used in the lower section, and then I located, by M. A. Wall, the boundary near the boundary of Kaohu, Kalamaula, at Kaohu, to as nearly as possible determine the lower and upper ends of the land of Makanalua. So that [78] upon that map I can as nearly as possible plot the Pease description, so that I can get up to a point he calls Kaulahuki.

Q. Do I understand you now to say from Monsarrat's registered map 1728 you compared data in Pease's map?

A. No, I did not say that. I used part of Monsarrat's map in the lower end and compared that with the map that I prepared or that was prepared by Wall and in some instances by the survey office, or other recognized surveys, so that the location

(Testimony of Bernard H. McKeague.)

of the big Fall as it pertains to the whole of Makanalua could be determined.

* * * * *

Q. (By Mr. Flynn): Referring again, Mr. McKeague, to this map of Makanalua, which you have just mentioned. This was done by you just this past month, is that correct?

A. That is right. Labeled that. The finish date of the map is labeled just this past month. The worksheet was [79] started quite some time ago.

Q. And in connection with your work on that you used Pease's map?

A. No. Pease had no map, to the best of my knowledge.

Q. You used Monsarrat's map?

A. In the lower section. I was only concerned with trying to see if Pease's location of Kaulahuki—that is why I prepared this map, and only for that purpose. I was not trying to determine the boundaries of Makanalua.

Q. Then this was used solely to determine that Kaulahuki section in Pease's description?

A. That is right.

Q. Not shown in his map?

A. In his description.

Q. You have not seen any map of Pease's, is that correct, of Makanalua?

A. I don't recall seeing any.

Q. How did you arrive at the location of Kaulahuki?

A. In the description prepared by Pease, he de-

(Testimony of Bernard H. McKeague.)

scribes the easterly boundary and then the westerly boundary, and there was no known survey on his part. He starts from a shot and gives the bearing and distance, and the calls, "And then to the mountain peak called Kaulahuki." Then he starts from a shot again from the westerly boundary and continues on up and comes to the head of the peak he calls Kaulahuki.

Q. You have placed that peak at the waterfalls, is that correct? A. Yes.

Q. But the language in Pease's description calls for a peak [80] known as Kaulahuki or a peak called Kaulahuki. I have a description by Pease, I think, and I would be glad to offer it to you, if you would like.

A. I have it here. The language he uses is, in the case of an easterly boundary of Makanalua, "After leaving the point of Hoalae, thence——"

* * * * *

Q. You may proceed.

A. "Thence along the top of the pali bounding Makanalua gulch or ravine on its easterly side, to a certain mountain peak at the head of said ravine called 'Kaulahuki.'" That is the language he uses in describing the easterly and westerly boundaries.

Q. Kaulahuki is referred to by him as a mountain peak?

A. "At the head of a ravine" also.

Q. Yes, but no mention whatever of a waterfall. Is that correct? A. No. [81]

* * * * *

(Testimony of Bernard H. McKeague.)

Q. Did you examine a survey by Harvey?

A. I used part of Mr. Harvey's work in making reference, as far as reference is concerned. [82]

Q. Did you examine a survey by Mr. Newton?

A. Yes, I have a copy of that map and I have used part of that data furnished by that map.

Q. From all of your work or rather your data did you not find in one or more of those maps a purported northern boundary of Grant 3437 which ran from Point X through Point K to Point A?

A. The maps shown, in that general direction, yes, but whether they went through Point K and reached A, I don't know.

Q. Do you recall any maps showing that?

A. There was one prepared by Wright, Harvey & Wright, I believe, that showed the boundary reaching in that general direction.

Q. Was that map of any use to you in your own computations and compilations?

A. Just for mathematical purposes, yes.

Q. You, I presume, did not agree with the boundary shown on that map?

A. That is naturally correct.

Q. Mr. Newton's map, did it not also show the boundary running from Point X through K to A?

A. I don't recall whether it went from X through Point K to Point A, but it was a map showing a line in that general direction.

Q. Now, this registered map No. 1728 of Mon-sarrat, did you check that and endeavor to ascertain on it where Points A, K and X would be?

(Testimony of Bernard H. McKeague.)

A. The registered map 1728, to the best of my knowledge, [83] does not show Points X, K and Ridge A. It does not come out that high. He was interested in the survey of Kalaupapa Settlement.

Q. As far as registered map 1728 is concerned, it meant nothing to you or rather it was used by you for no other purpose except to check some of the lower portions of Makanalua?

A. No. The upper portions to determine Kaulahuki Falls near the Big Falls. I wanted to determine one point and only one point: If the point Kaulahuki is correct.

Q. Can you recall whether registered map No. 1728 by Monsarrat shows Apana 3 of Kahanui?

A. I have here a tracing from that map 1728. How accurate it is I do not know, but this should give you a good idea of what that map shows. [84]

* * * * *

Q. (By Mr. Flynn): Can you point out, Mr. McKeague, where on this map you located Kaulahuki?

A. Kaulahuki was never located on this map.

Q. Then will you describe in what way you used this to change the location of Kaulahuki?

A. I used the topography, which is shown on the lower part, which I considered fairly accurate. The upper part I considered very inaccurate. For that reason I located the topography, which was actually located on the ground by surveys made in the case of Kalamaula survey made by Monsarrat, the ridge point from Hoalae mauka was located by

(Testimony of Bernard H. McKeague.)

both Wall and myself to be accurate. The other points were also located by me.

Q. Excuse me. What ridge points were located to be accurate? [85]

A. The points located.

Q. What points?

A. At the Big Falls, for instance. At this point. The relative positions of these points with regard to this, as best as I can, was considered fairly accurate. It is a compilation of the physical features as they relate to one another. The lower end located—as I was once given a U. S. Geodetic survey, it fits in with Monsarrat's location of his stonewall reference and other references in here. I consider that the upper part of his map is not accurate according to the data available to me.

Q. Is this tracing to the same scale as your map of Makanalua?

A. That is right.

Q. I want you to lay this tracing over as close as it can be done. This tracing shows Waihanau Valley continuing up to a point well beyond where you have established Kaulahuki or your map. Is that not so?

A. That is right.

Q. And this tracing from a point Alae—I will withdraw that please, Mr. Reporter.

The point Alae on this tracing of the very old map is most likely identical with the point Hoalae that is shown on your map?

A. That is right.

Q. They are meant to be the same points, are they not?

A. That is right.

Q. The description of Pease that you have re-

(Testimony of Bernard H. McKeague.)

ferred to reached this point Alae or Hoalae, did it not? A. That is right. [86]

Q. From there on it was by general language "Following the top ridge and ridge or peak known as Kaulahuki, at the head of a ravine," isn't that so? A. That is right.

Q. On this tracing wouldn't the head of the ravine be at this extreme tip of the map?

A. That is according to Monsarrat's map, which I considered very inaccurate in the upper limits.

Q. But you are telling me that you have taken Pease's description and distinguished it from what is shown on Monsarrat's map or I mean on this map or this tracing?

A. No. I did not use this Pease description on Monsarrat's map. I used Pease's description on the composite map, and I compiled the map.

Q. You did use Monsarrat's map for the extreme upper ends of what he placed in here as Waihanau Valley, is that correct?

A. I just used the accurate location of the topography about two-thirds of the way up because it is almost evident that he was only interested in the lower section of Makanalua to round off his map in the upper limits. He just evidently fudged on that portion, but I was not interested in using that portion of the map for my purposes. [87]

* * * * *

Q. Can you examine these exhibits and advise me just which ones or which parts of letters or

(Testimony of Bernard H. McKeague.)

correspondence gave you the information you regarded as satisfactory?

The Court: Hand to the witness the applicant's exhibits for examination.

A. I probably can answer that question without examining these, that in reading the whole thing, between the Government officials and Meyer, that the intention of the parties concerned was to convey all of the land that he bought and paid for and had occupied all those years.

Q. I want to ask you specifically the material in these documents or exhibits which gave you that indication. I therefore ask you to examine the exhibits and answer the question that way. [89]

* * * * *

A. For a specific answer, I would say no, but it is a collective information I got as to the intent of what was desired under the correspondence as to what they wanted to convey. It was not as if I say from this correspondence, regular, definite bearing and distance and very specific evidence by language, that the boundary followed along the lines that I chose.

The Court: Mr. McKeague, let me suggest this. I think we will move along a lot faster. The question now on cross-examination, in the light of your testimony, is that you have used certain documents, and that you have enumerated. The question now is whether or not included in those documents are the exhibits which have been admitted in this proceeding thus far. Those exhibits are before you. Now,

(Testimony of Bernard H. McKeague.)

please just look through them and just answer yes or no, if you recall or if you don't recall, say so, which of those exhibits in evidence you used perhaps in addition to others to arrive at your intention.

A. I refer more specifically to the notation at the bottom of the first patent to Grant 3437, at the bottom of which is the correction made or intended to be made of the course, "Thence around the head of Waihanau Valley," and so forth. [90]

* * * * *

Q. Now, can you refer to any other items among this correspondence [92] or these exhibits to support your conclusions as to what the parties intended?

A. The fact that in Pease's description, for one thing, he called the Big Fall "Kaulahuki." And yesterday I did not recall seeing Pease's map, but I found a tracing, which is registered number 505,—and although Pease is known on record as being a careless surveyor,—I found in this particular case, scaling the map from Hoalae up to the Big Fall, he comes within a couple of hundred feet of the Big Falls on the easterly boundary of Waihanau Gulch or valley.

Q. But Pease called for a peak by the name of Kaulahuki, didn't he?

A. And the head of the——

Q. Please answer that yes or no. Will you? Did he call for a peak known as Kaulahuki?

A. That is right.

(Testimony of Bernard H. McKeague.)

Q. The Big Falls could not be called a peak, could it?

A. He chose to call it a peak, although he says a ravine, "At the head of a ravine" also.

Q. Can a surveyor finding an area of land headed by a falls refer to that as a peak?

A. As I said, the word "peak" is what he chose to use together with the wording "At the head of said ravine," and I believe the word "ravine" applies more than the words "mountain peak" in this particular case.

Q. What is a mountain peak?

A. It is the top of a mountain, like Punchbowl or I mean Leahi or any other prominent projection of land.

Q. Is there any possibility of a surveyor, even a poor [93] surveyor, confusing a mountain peak with a waterfall?

A. No. A mountain peak is very definite. As I said, Pease just chose to call this particular point a mountain peak or the head of said ravine. It is a conflicting statement in his own language.

Q. You are saying, then, that he chose to call a waterfall a mountain peak?

A. Yes, and he qualified it with "The head of said ravine."

* * * * *

Q. Now, will you take a look at the cancelled grant with the notation at the bottom? Have you any idea whose writing that is, Mr. McKeague?

A. No.

(Testimony of Bernard H. McKeague.)

Q. You don't know. A. I don't know.

Q. Do you think it might be Mr. Meyer's?

A. Quite possible.

Q. Do you think it might be Monsarrat's?

A. It could be possible also.

Q. You have stated that you relied on this writing to show the intentions of the parties as to what was to be included? A. That is right.

Q. Does your exhibit there have the reverse side, including the plat, the map? A. Yes.

Q. This contains additional writing, does it not, "At an [94] area above the north line of this map"?

A. That is right. It indicates Waihanau Valley.

Q. And it also indicates Waialeia Valley?

A. Over the old Makanalua Valley. He scratched out the word "Makanalua" and in pencil wrote "Waialeia."

Q. Down below here is written "Makanalua," is it not? A. That is right. In pencil.

Q. Would it appear to you that the handwriting above the plat saying "Waihanau Valley and Waialeia Valley" over the crossed out "Makanalua Valley" is similar or identical to the handwriting at the foot of the grant?

A. I did not try to compare that at that time.

Q. Would you just take a look now?

The Court: This witness is not a handwriting expert.

Mr. Flynn: I don't mean to qualify him as such, your Honor, or hold him to any ability of that sort, but to the naked eye I believe there is a definite

(Testimony of Bernard H. McKeague.)

similarity in the writing, and I would like to ask him if he agrees with it.

A. I don't think so.

Mr. Cass: I object to it as immaterial and not proper cross-examination.

The Court: Objection sustained. [95]

* * * * *

Mr. Flynn: I will now question him on the final grant, Grant 3437, Exhibit B.

* * * * *

The Clerk: It is Applicant's Exhibit B.

* * * * *

Mr. Flynn: It is the grant from which title stems to the applicant.

Mr. Cass: That is a conclusion of counsel.

Mr. Flynn: It is in the abstract, your Honor, and it is in the pleading as well.

The Court: Proceed.

Q. (By Mr. Flynn): The grant, Mr. McKeague, Exhibit B, contains both a description and a map, does it not? A. That is right.

Q. As a general principle of surveying, where a grant contains a description and a map, both are to be considered in determining the lands conveyed to the grantee, are they not? [96]

* * * * *

A. Not necessarily, is my answer. If the map was prepared at the same time as the description and prepared under the supervision of the author of the description, it is correct.

Q. (By Mr. Flynn): I am asking about princi-

(Testimony of Bernard H. McKeague.)

ples of surveying. Where you find a grant containing a description and a map, do you not begin in determining the lands conveyed by the grant to check as to whether the map and description were prepared by the same party? [97]

* * * * *

A. I did.

Q. And what did you find?

A. That there is no evidence, as far as I can find, that Mr. Monsarrat plotted those shots as shown in his field book and that the sketch was prepared at the same time that the patent was issued or when he wrote his description, in 1886, as I recall.

Q. Did you confine your search for material to the field books of Mr. Monsarrat?

A. And I inquired for all maps available that he had in the Survey Office. It was my understanding that a lot of his field books and records were supposed to be in the office of Wright, Harvey & Wright. I went to Wright, Harvey & Wright's office and tried to get all information, if they had any, of Monsarrat in connection with this work, and I [98] could not get anything there.

Q. Did you examine any of the registered maps of Monsarrat at or about this time in the Government Survey Office to determine whether the field notes had ever been placed by him on any of his maps?

A. That I did, and I could not find anything like that.

(Testimony of Bernard H. McKeague.)

Q. You could not find anything like that?

A. That is right.

Q. Do you recall looking at a 1,000-foot to the inch map and a 1,000-foot to the inch worksheet on file and registered in the office of the survey department of the Territory, made and prepared by M. D. Monsarrat, covering Central Molokai and dated in 1886?

Mr. Cass: We object. More than one question being asked at once.

Mr. Flynn: I will be glad to ask the first part, if he checked the 1,000-foot map.

A. I have a section of that map, 1,000-foot, made by Monsarrat, a blueprint.

Q. The 1886 map?

A. I don't recall the date of the map because I just took a sectional point of the map.

Q. Do you have that among your papers now?

A. No. It is in my office.

Q. Do you recall a worksheet on the scale of 1,000-foot to the inch? A. No.

Q. Do you recall examining a map of Central Molokai by M. D. Monsarrat, dated in 1886, made on a scale of 2,000 feet [99] to the inch?

A. Yes.

Q. You do? A. Yes.

Q. Do you also recall a working sheet from which that map was made or did you examine only the map?

A: I only examined the blueprint.

Q. The blueprint?

(Testimony of Bernard H. McKeague.)

A. Of the 2,000-foot map.

Q. Where did you find that blueprint?

A. It was furnished to me by the Survey Office, to the best of my knowledge.

Q. It is in the Territorial Survey Office, as far as you can recall now?

A. That is right.

Q. Did you find Kahanui, Apana 3, on that map?

A. As I recall, yes.

Q. Did you check that area on that map against this map or sketch in the grant?

A. I did not.

Q. Was there any reason why you refrained from doing so?

A. Because I did not think it was an accurate location of the topography in that vicinity.

Q. Did you determine that by simply looking at the map?

A. In mapping my location of the conditions on the ground, yes.

Q. Was this the time that you rejected any further consideration of the map or sketch attached to the grant?

A. I don't recall when I made that rejection because this [100] work was continued over a period of time and I worked at this thing for perhaps weeks or months.

Q. Do I understand now that you did examine this map or sketch attached to the grant?

A. I did.

Q. Did you ascertain whether any of the lines were reasonably accurate?

(Testimony of Bernard H. McKeague.)

A. There was nothing to ascertain as far as values are concerned except to probably superimpose that line over an accurate topographic map.

Q. Was there any specific time, Mr. McKeague, that you definitely rejected this map or sketch attached to the grant?

* * * * *

A. As I said earlier, I worked on this thing for a period of weeks or months, and I don't know when my conclusion was reached in rejecting this sketch.

Q. I am only asking you now if you concluded to reject entirely this map or sketch as of any value in the grant?

A. That is right.

Q. You did conclude that?

A. That is right.

Q. Did you thereafter confine yourself to the material in the description in ascertaining the lands which were conveyed to the grantee?

A. The course "Thence around the head of Waihanau Valley," [101] and so forth, has been my principal point of exploration.

Q. If you will take a look at the map or sketch attached to the grant——

A. You mean Exhibit B?

Q. Exhibit B. Can you state from looking at it whether it is drawn to scale?

A. I did not check that. It is possible.

Q. You stated, Mr. McKeague, that Mr. Pease's reputation as a surveyor was not so good.

A. That is right.

(Testimony of Bernard H. McKeague.)

Q. Will you state your understanding of Monsarrat's reputation as a surveyor?

A. Excellent.

Q. Among the best, was he not?

A. That is right.

Q. Was his reputation not also quite widespread for his excellent memory?

A. That I don't know. My knowledge of the man is brief. That he was an excellent surveyor.

Q. And he did extensive surveying work on these islands and particularly on Molokai, in 1885 and 1886, did he not?

A. That is my understanding.

Q. These field notes that you have looked at and which you stated you looked at in the course of your work indicate to you that he did extensive surveying in that general region, in Central Molokai. Is that not right?

A. That is right.

Q. Is it not true that a very large part of his surveying work is still accepted as entirely correct?

A. That is right.

Q. And a very large part of that surveying work is still the foundation for present-day surveyors in rechecking old land boundaries or associated matters?

A. To the best of my knowledge, that is right.

* * * * *

Q. Now, referring once again to the descriptive language of Surveyor Pease as to the boundaries of Makanalua. If you will excuse me a moment, I will have to refer to it myself. Do you find yours?

(Testimony of Bernard H. McKeague.)

A. Yes.

Q. If you will read the part from where the first metes and bounds descriptions ends at "Alae" or "Hoalae."

A. Yes. "Thence to the top of the mountain ridge called Hoalae."

Q. I am sorry. Oh yes. Yes. Further on now. That is correct.

A. "Thence following along the top of this pali bounding Makanalua gulch or ravine or its easterly side, to a certain mountain peak at the head of said ravine called 'Kaulahuki'".

Q. Yes. "Following the top of the pali," does it say? [104]

A. That is right.

Q. Look at your map, which is your Exhibit A. Will you follow me from Hoalae on? This is the top of the pali?

A. That is right.

Q. Does the pali end here?

A. No.

Q. The pali keeps going, does it not?

A. Just for about three or four hundred feet.

Q. Three or four hundred feet?

A. Yes.

Q. Is there no pali along here?

A. There is.

Q. Then why do you say three or four hundred feet?

A. The nature of the pali or the precipice changes. You can call this a pali and it would not necessarily be as steep as the pali here. This pali, between this point and this point, can be traversed much easier than the pali on this side.

Q. Yes, but if I understood you a minute ago,

(Testimony of Bernard H. McKeague.)

you said the pali does not continue beyond this three or four hundred foot space?

A. That is right. But it changes as to its steepness.

Q. But it does continue as a pali?

A. That is right.

Q. It continues all the way down here, does it not?

A. That is right.

Q. To this area you have referred in your map, Exhibit A, as a portion of Grant 3539 to R. W. Meyer?

A. That is right. [105]

Q. Wouldn't this general area, being this portion at the extreme southerly tip of Grant 3539, be a peak or a mountain peak?

A. No.

Q. It could not be?

A. No.

Q. Will you state what it is?

A. It is sort of a grassy plateau that slopes gradually down towards Waialeia Valley.

Q. Where, then, in this description does the pali follow? I am sorry. Not in this description. I want to get the record straight, your Honor. Where, as shown on your map, Exhibit A, does this pali follow?

A. It follows the conventional boundary line as shown by the long dash and dot to two dotted lines indicated here, and in this particular area by the course No. 23, 311 degrees 12 minutes, 400 feet; Course 24, 27 degrees 52 minutes, 319.80 feet, and on through by the next course, 294 degrees 36 minutes 15 seconds, a distance of 2030.40 feet.

Q. You reached this point, referred to as M. D.

(Testimony of Bernard H. McKeague.)

M's Ridge A, as shown on your map. Is that not where this pali ends and a new pali begins?

A. No. It is a continuous pali from Hoalae all along the head of Waialeia Valley, up around to the survey station.

Q. But the direction changes sharply, does it not? A. That is right.

Q. This pali, and I am referring again to the line towards the extreme northerly end—no—southerly end of Grant 3539, bounds this valley area in here, does it not, and separates [106] it from this valley area in here. A. That is right.

Q. Is this plateau-like area not raised above the ridge formations you have shown going down into each valley?

A. You are speaking of the new boundary line as I indicate it here by Course 311 degrees 12 minutes?

Q. I am speaking of this entire little area on this map, approximately three acres.

A. It slopes down from the Waialeia Valley.

Q. So that there should properly be two palis here, should there not? One along this extreme tip of this disputed valley, we will call it, and the other at the edge of the approximately three-acre area, where it slopes down to Waialeia Valley. Is that not so? A. That is right.

Q. And the area surrounded by these two palis, we will refer to for convenience, that three-acre area, does it not constitute a mound or peak, as you view it from, say, the middle of Grant 3539?

(Testimony of Bernard H. McKeague.)

A. No, because you cannot see the area that slopes away from the southwesterly side of that little three-acre piece.

Q. Do you see this pali, the one on the lower valley?

A. That is right. And you cannot see the other area from Monsarrat's Point X, Y and so forth.

Q. You cannot see that?

A. You cannot see that until you are there.

Q. Is there not in the general area of this ridge A or in this Grant 3539 a rise or mound or peak?

A. The terrain starting from Monsarrat's Dry Tree, through [107] Ridge A, on up in the easterly direction, was more or less the same, viewing that from across the disputed area.

Q. No. I am asking about viewing it from the approximate center of Grant 3539.

A. When I was on this grant the plateau as shown here by the word "Meyer" on Grant 3539, I didn't think it was necessary or I didn't notice anything that would indicate a peak.

Q. Or mound? A. Or mound.

Q. Or any hill?

A. The terrain was just about the same, viewing it in a general location.

Q. May we take a look at your contour map? I beg your pardon. I thought this had been introduced in evidence. Is that incorrect?

Mr. Cass: It is marked up above there.

The Clerk: No, not that one.

(Testimony of Bernard H. McKeague.)

Mr. Flynn: This one does not seem to be marked.

Q. (By Mr. Flynn): Looking at your contour map of this same—excuse me. This is a three-acre area?

A. Yes.

Q. This is supposed to be three acres?

A. Yes.

Q. Very well. That is what I am talking about then.

A. That is right.

Q. Look at your contour map. Does that not appear to be raised up above the immediately adjacent land?

A. Not necessarily. It shows that the contour slopes both ways from that area and the intervals are set at 100-foot [108] angles.

Q. Is this a contour line?

A. That is right. That is the 2,600-foot contour line.

Q. And there is a contour line from here?

A. That is right. That is the 2,700-foot.

Q. Is this a contour line here?

A. That is right. That is the 2,700-foot contour line sloping down the other way.

Q. And you say this includes the approximately three-acre parcel, is that not so?

A. That is right.

Q. And then a short distance away is the 2600-foot contour line, isn't that so?

A. That is right.

Q. And a slightly longer distance, in the westerly direction or towards the disputed valley area,

(Testimony of Bernard H. McKeague.)

the disputed gulch area, is likewise a boundary and the 2600-foot level, is that not right?

A. That is right.

Q. Does that not show that this three-acre parcel is raised above the lands immediately around it?

A. Not necessarily. It shows there is a high contour break between the Kahanui side and the Waialeia Valley.

Q. It is a raised area, then? A. Yes.

Q. Is not that raised portion visible from, say, approximately the middle of Grant 3539?

A. As I recall, I did not try to make a particular observation, but I believe it is the same as this plateau area, [109] generally speaking. There is nothing prominent.

Q. This plateau area as shown on your contour map is 2500 feet? A. That is right.

Q. And the three-acre area we have been talking about is 2700 feet? A. That is right.

Q. Does it not appear to you from examining your own contour map that that would be visible as a raised area from the plateau area of 3539?

A. The rise is gradual from 2500 to 2700, so it does not have to be very pronounced as a peak, one that you would see, something like Punchbowl or Leahi.

Q. But it could be visible as a peak, not pronounced, is that not so? A. No.

Q. Could it be visible as a mound or raised area? A. Not in that direction.

Q. Nothing in your contour map shows it would

(Testimony of Bernard H. McKeague.)

be interfered with, does it? Now, referring to the same map and to the 2500-foot contour, the plateau area, and placing with my finger the direction to and including the three-acre parcel——

A. (interrupting): The rise is still gradual and there is nothing abrupt, although there is a 200-foot difference in elevation, so that one would indicate above the 2700-foot contour or the three-acre piece there would be a peak, observing it from the 2500-foot contour line.

Q. Is it observable at all from here or have you stated you don't recall? [110]

A. From here, at the course marked 318 degrees 2 minutes, 373.10 feet, it seems to me I saw that point more or less on the same gradual rise.

Q. Beyond this point you did not see anything, in a southerly direction, that would be very close to it, is that correct? A. I don't understand.

Q. What I have in mind is that examining your own contour map, beyond this point, it drops down to 2600 feet, this being the 2700-foot area, in the immediate vicinity, isn't that right?

A. The land drops off, down, for perhaps 50 feet in about maybe 500 feet, and it is a gradual rise towards the trig station or in a northeasterly direction.

Q. The visible portions in the gradual rise beyond the three-acre parcel are noticeable as such are they not? By that I mean they are obviously visible points well away from the three-acre parcel, isn't that so?

(Testimony of Bernard H. McKeague.)

A. That is right. That is observed from the point I stated before, 318 degrees 2 minutes, 373.10 feet.

Q. Then do we not get back to the proposition that this three-acre area is equivalent to a mound or peak and rises, possibly generally, from Grant 3539?

A. No. That was not my observation.

Q. You don't recall seeing it that way?

A. No.

Q. It does look that way on your contour map, doesn't it?

A. On the contour map the contours which were superimposed on the geological survey indicate that it does. [111]

Q. Did you do any of this contouring yourself?

A. No. There was a compilation of the geological survey and the observations made by Mr. Newton in his survey of the floor of the valley, and I just corrected it. I assumed that the elevations given of the floor of the valley and the geological survey on the top, the one I used, and this map was prepared for a different purpose.

Q. Then you did not do any taking of elevations yourself? A. No.

Q. Did you take elevations at this place you were talking about on direct examination?

A. Where there are differences in elevations, yes, but running the true level to see whether it jibes with the elevations or the data by Mr. Newton, no.

(Testimony of Bernard H. McKeague.)

Q. You did not take these level elevations then, you simply took the differences between elevations at these points? A. That is correct. [112]

* * * * *

The Court: Has the contour map been offered?

Mr. Cass: It has not.

The Court: Do you desire to offer it?

Mr. Cass: I have no desire to offer it. [113]

The Court: It has been used and referred to in much of the testimony here.

Mr. Cass: If you wish the record clear, I will offer it for the record, but I have no—I am not interested or I am not endorsing the contour map at all. The contours there are contours from the Government map, not from this surveyor's own knowledge.

The Court: Does counsel have any objection to it becoming a Court's exhibit?

Mr. Cass: Not a bit.

The Court: Very well. Let the contour map become Court's Exhibit 1.

(The contour map referred to was marked Court's Exhibit 1 and was received in evidence.) [114]

* * * * *

Mr. Flynn: I would like the record to show, your Honor, that this is a controlled topographic mosaic, showing portions of the land of Kahanui and Waihanau Valley, Molokai, T.H.; topography by photogrammetric methods; date of photo, De-

(Testimony of Bernard H. McKeague.)

ember 23, 1949; containing the printed identity of R. M. Towill, Civil Engineer and Surveyor.

The Court: The record may so show.

Q. (By Mr. Flynn): I will ask you to examine Territory's Exhibit 1 for Identification, Mr. McKeague, and I ask you if you can recognize this topographic photo?

A. In general, I think so. [115]

* * * * *

Q. (By Mr. Flynn): I now will ask the witness if upon examining this mosaic he can find or point out the matter we referred to before as the locality where he has placed the head of Waihanau Falls or the boundary of the disputed area as he supposes it to be.

A. Since there are no identifying marks on this photograph to indicate the point I have used it will be difficult for me to point, other than to make a guess, as to the first point that you have here, about nine inches from the lower left-hand corner, which seems to show a pool at the top of which is where I believe I have located the Big Fall.

Q. All right. Will you mark this place you have referred to in this last answer of yours; mark it with—it should be identified in some way.

The Court: Put any symbol that you want.

Mr. Flynn: "Peak" and the letter A there follows below, so it may be seen. Very well. [117]

* * * * *

Mr. Cass: I will insist that this map with the lines drawn thereon, which are not topographic

(Testimony of Bernard H. McKeague.)

or relative topographic originally, be identified and proven before this witness has to point to any location or any other point on this in which he may be assisted by the lines so drawn.

Mr. Flynn: That is not much of an objection, your Honor, but I would be very happy to postpone the further cross-examination [119] on this exhibit until after it is properly put in evidence.

The Court: Very well.

* * * * *

Q. (By Mr. Flynn): Now, Mr. McKeague, we can return to your map which is Applicant's Exhibit A. You have testified, if my recollection is accurate, that the pali or the top of the pali begins from the point Hoalae and follows around the entire broad area of Grant 3539, to which I am pointing, continues beyond the point marked "M. D. M's Dry Tree," and approximately three or four hundred feet thereafter. Is that correct?

A. As it pertains to that plateau, that is right.

Q. Didn't you also testify that the pali still continues beyond that point all the way along to approximately this area marked "M. D. M's Ridge A"?

A. That is right. Where you previously followed. It went along the Waialeia Valley side of the break, which is around the three-acre piece.

Q. This is all the same pali, from M. D. M's Ridge A, around the Waialeia Valley side of the three-acre piece, and continuing all the way to the end of Grant 3539, shown as the Point "Hoalae"?

(Testimony of Bernard H. McKeague.)

A. On the easterly side of this Grant 3539 and on the Waialeia Valley side, your answer is "correct", it follows all the way from Ridge A to Hoalae. [120]

Q. And on the westerly side, we just agreed, it likewise follows all the way from Hoalae to and including the beginning or northerly point of this small three-acre piece? A. That is right.

Q. Now, to arrive at the point you have referred to as Kaulahuki, as set forth in Pease's description, you have departed from this pali, have you not, and come down to this waterfall?

A. That is right.

Q. The description does not call for any departure from the pali, does it?

A. Following the head of the ravine, the break in the pali from that point on where I make that departure changes drastically from a very steep pali here to one which could be traversed on foot or by animals, and that is not the case in the part of Waihanau Valley that is shown as the boundary.

Q. The break you are speaking of is three or four hundred feet beyond the point at which you have departed from this pali in the boundary, is that not so? A. No, that is not so.

Q. Didn't I understand you to say a while ago just words to the very effect, Mr. McKeague, now, that this pali continues on beyond some three or four hundred feet beyond the point "Dry Tree"?

A. In its general shape, and then takes a sharper break as it pertains to the word "pali" in reference

(Testimony of Bernard H. McKeague.)

to boundary, the answer is not right. As it pertains to the word "pali" as to abrupt change in the land, yes.

Q. Consider for a minute that you are at this point— [121] Hoalae—looking in an almost direct southerly line, as shown, compared with this early showing—true north. Is that correct? Can there be any point at this spot marked "M. D. M's Dry Tree" where the pali breaks off, discontinues?

A. I never made that observation.

Q. How far back on Grant 3539 have you looked, or rather from what point, looking at this map, have you on Grant 3539 looked in a southerly direction?

A. I looked from the vicinity of "Dry Tree," Monsarrat's "Dry Tree," I looked both ways.

Q. Were you never north, on Grant 3539, of Monsarrat's point "Dry Tree"?

A. I was. I walked down there but my observation was only in the northerly direction. I walked down quite a ways to observe the nature of the pali and lay of the land.

Q. Will you state approximately how far down you walked? A. Approximately half way down.

Q. Approximately near M. D. M's Ridge C?

A. That is possible or it may be where the letter "A" in the word "Kahanui," the first letter "A" in the word "Kahanui 3."

Q. Another six or eight hundred feet beyond Ridge C, maybe? A. About a half mile.

Q. Half a mile. Beyond Ridge C, I asked?

(Testimony of Bernard H. McKeague.)

A. Oh, I am sorry. Probably about four or five hundred feet.

Q. But you made no observations looking southerly from there, is that correct? A. No.

Q. Now, with regard to the survey of Grant 3437, how far [122] down in the valley below the intake did you go?

A. I did not go beyond the first fall.

Q. The first fall. In which direction?

A. That is right at the intake, but I sent a rodman down to the Big Fall and located the intervening falls. [123]

* * * * *

Q. Above the intake or going southerly did you do any actual surveying? [124] A. No.

Q. Will you relate to us just what you did do above the intake in the course of your work on this survey?

A. I walked to the floor of the valley and came up to about the fourth fall that was shown on Mr. Newton's map, and was not able to scale it, so I went back.

Q. You were not able to scale the fall?

A. It is about eight or ten feet.

Q. But it is impassable, is that right?

A. No. It is passable; with some help you can scale it.

Q. But you did not try it?

A. I did not try it because I was alone.

Q. Was there a pool there?

(Testimony of Bernard H. McKeague.)

A. Yes, there was a pool there, about sixty feet across.

Q. In your direct examination did you not identify that as Waiau?

A. No. I did not go that far.

Q. Did you go to Waiau at any time?

A. Yes. What I thought was Waiau. But my approach was from the southerly side.

Q. Will you take this pencil and mark on this map where Waiau is?

A. Right here (indicating).

Q. Will you write it in below? You have it as "Waiau Falls." Isn't there also a pool there?

A. That is right.

Q. Did you go along this stream to any points above Waiau?

A. Yes. I approached the floor of the valley by coming down from a point above Ridge A and scaling down the sides [125] to the bottom of the valley or into the stream bed and all the way down to Waiau Falls.

Q. You have referred to a general area where the distance 143.00 appears, about one inch below the word "grant" on this map, Exhibit A. Correct?

A. That is right. And my entering the floor of the valley should be a little higher up, at the letter "t" in the word "grant" just referred to. [126]

* * * * *

Q. In locating the head of the valley you undoubtedly follow around the ridge beginning with M. D. M's X, as shown on your map, is that not so?

(Testimony of Bernard H. McKeague.)

A. That is right.

Q. The language here is "Boundary follows along top edge of pali." Do you know that?

A. That is right.

Q. If you will follow my pencil, beginning from the point M. D. M's X, I am following along the top edge of the pali, am I not?

A. That is right.

Q. And I reach this point, where you take a line down to [128] the Big Falls, is that not right?

A. That is right.

Q. To follow along the top edge of pali I simply continue along there, do I not? A. Yes.

Q. Through Point K?

A. That is right.

Q. Here, to the head of the valley, then drop off from the top edge of the pali at that point?

A. Up there (indicating). For this reason, this edge of the pali is much steeper than the portion shown in hachures, from there on up (indicating).

Q. But this is still distinctly the top edge of the pali, is it not? A. That is right.

Q. What I am pointing to is the area beyond Point K. A. That is right.

Q. And if a surveyor in locating a head of a valley does so only while following the top edge of a pali, there is no reason to leave that top edge of the pali and go down to the Big Falls, is there?

A. Very definite reasons in this particular case.

Q. Aside from any particular case, if a surveyor is marking out a valley by following the top edge

(Testimony of Bernard H. McKeague.)

of a pali, does he arbitrarily leave the pali, where there is no natural marker to take him away from it?

A. If he has to locate the top of the pali throughout its whole length he has got to go along the same ridge regardless of whether it has any reference to boundaries or not, if you [129] are just locating the pali.

Q. Yes. If you are locating a valley entirely surrounded by palis there would be no reason to leave at this point that you have marked, is there?

A. There are probably good reasons to leave it.

Q. If a valley is bounded solely by the language "top edge of the pali," and referring that language to this map, there is no reason to leave the top edge of the pali at this point and descend to the Big Falls, is there?

A. Your question is hard to answer because if you are to locate the top of the pali as it pertains to a valley, you continue on up indefinitely until it peters out at the very end.

* * * * *

Q. (By Mr. Flynn): Looking at the ground that you looked at and starting from M. D. M's X as shown on your map and then following along the top edge of the pali and looking for a head of a valley which is bounded only by the top edge of a pali would loosely give you "continuing beyond this point," wouldn't it? [130]

* * * * *

(The question was read by the reporter.)

(Testimony of Bernard H. McKeague.)

Q. (By Mr. Flynn): To take you well beyond the point at which you have shown and descend to the falls through Point K, continuing on as shown on your map, and even clear out of the Kahanui area and beyond, would it not?

The Court: Now.

Mr. Cass: Now, the words of the grant are "Around the head of Waihanau Valley." Waihanau is a place name. How would he determine the edge of a valley by following the pali all the way around to the head of the gulch? That is not material to this case and does not prove where Waihanau Valley goes. The question of surveying does not enter into this deal at all and it is not proper cross-examination. How he would determine the head of a valley as described in a [131] grant, when the valley is described by place name, is determined by where the place name ends, not where the physical contours of the land continue up several miles, several miles on up. Both the Government and the applicant concede that the valley goes a long ways beyond both boundary lines. The Government claims that we cross the valley at one point and we say we cross it at another. So that following the edge of the palis a way up, as is indicated they are several miles above the top of the falls, has nothing to do with the case or with fixing the boundaries of Waihanau.

Mr. Flynn: This is a great statement about what the Government concedes, your Honor. It is not in the case at all that the Government concedes that

(Testimony of Bernard H. McKeague.)

the valley goes around the—it is not in the evidence here, it is not in any testimony. And I would like to ask the Court to note my request to strike all this part of the so-called objection which is pure testimony on the part of counsel.

The Court: The motion to strike is denied. What is the relevancy of the question?

Mr. Flynn: I am questioning him on his own map and the markers shown on it, Exhibit A.

The Court: As a matter of cross-examination, what is the relevancy of the question asked? The objection is on the relevancy of the question.

Mr. Flynn: As a check on the accuracy of the survey. As a check, rather, on the accuracy of the map and where the map shows the boundary follows along the top edge of the pali. And I can certainly ask him if the top edge of the pali does not continue beyond the point where he has shown a boundary [132] marker.

The Court: The objection is overruled. Proceed.

Q. (By Mr. Flynn): Do you remember the question, Mr. McKeague?

A. Will you repeat the question, to be sure?

(The question was read by the reporter.)

The Witness: Will you repeat it again, please? I am not prepared at this time to answer that question.

Q. (By Mr. Flynn): Is it not so shown on your map?

A. As it pertains to the words “and surrounds”—no, but as a location of the top edge of the pali

(Testimony of Bernard H. McKeague.)

continues indefinitely, shall I say, until it peters out to the very extreme southeast end of the gully.

Q. (By Mr. Flynn): For clarification, Mr. McKeague, your own surveying work does not go beyond this point, approximately in the "T" of the word "grant"? Grant 3437. Isn't that right?

A. That is right.

* * * * *

Q. (By Mr. Flynn): May I see the Exhibit B, please? Calling your attention, Mr. McKeague, to Exhibit B, which is the Grant 3437, the final grant, issued October 20, 1889, and [133] specifically calling your attention to the map or sketch, do I recall correctly that you stated this map or sketch could have been drawn to scale but you didn't know from examining it? A. That is right.

Q. And you never found any material in the Survey Office to indicate to you whether that was drawn from a map on record?

A. In the south and southwesterly sides the lines seem to indicate that they follow properly surveyed lines, but there is no way on the record I could find that shows that the line on the northerly side, which is abutting what is indicated on the sketch here as Waihanau Valley and Waialeia Valley, as being plotted to scale; and none of the records that I could find of any of Monsarrat's notes to show that he located the line as shown on the sketch except in its extremities.

Q. Specifically, though, am I correct in saying that you do not recall seeing any map or any record

(Testimony of Bernard H. McKeague.)

in the Survey Office which would show even the south and west lines of this to have been the basis for the map or sketch on the grant. Is that correct?

A. That is right.

Mr. Flynn: I have here, if the Court please, Registered Map No. 1288, containing the identification of "Molokai, middle and west section, 1:24,000, and containing in the center of the map the following identification: "Hawaiian Government Survey, W. D. Alexander, Superintendent. Molokai. Middle and west section. Map and survey by M. D. Monsarrat. Scale 1:24,000 or 2,000 feet equals 1 inch. 1886." I will ask leave to introduce this exhibit as Territory's Exhibit [134] for Identification No. 2, and rather than have it marked at this time will ask leave later to submit photostat copies of the portion of this exhibit which will be concerned with the testimony.

The Court: Any objections? It will become Territory's Exhibit 2 for Identification.

(The map referred to was marked Territory's Exhibit 2 for Identification.)

Q. (By Mr. Flynn): Calling your attention, Mr. McKeague, to this map, do you not see at the extreme right-hand side an area of land marked "Kahanui" and down below, well down below marked "Apana 3"?

A. Yes.

Q. That is in black printing or rather—I will withdraw that. The words "Kahanui" below that "1048 acres" below that "Apana 3" are in black print, are they not?

A. That is right.

(Testimony of Bernard H. McKeague.)

Q. Between the words "Kahanui" and the words "1048 acres" there is inked in the following: "Gr. 3437, R. W. Meyer," is that correct?

A. That is right.

Q. I will ask you to examine that piece of this map we have referred to and then examine the sketch or map attached to Grant 3437, and I will ask you if they appear to be substantially similar? Will you answer that question?

A. That is right.

Q. They do? A. They do.

Q. Do they not even appear to be identical?

A. No.

Q. On the boundaries do they not appear to be identical, as to "Kahanui 1048 acres"?

A. In the southern and southwesterly boundary they seem to be identical, but where it has a meandering line following from Puu Kaeo, along Wai-kolu and along Waialeia and Waihanau Valleys, it is not necessarily identical.

Q. They appear very similar, though, do they not? A. In a very general way, yes.

Mr. Cass: Is this supposed to be a tracing off of that?

Mr. Flynn: I think it is a tracing off the grant. However, I will mark it for identification.

Mr. Cass: Let's lay it over the map and find out.

Mr. Flynn: That is what the testimony is going to be. I will show to the Court here a tracing and

(Testimony of Bernard H. McKeague.)

ask that it be marked Territory's Exhibit 3 for Identification.

The Court: The tracing will be marked Territory's Exhibit 3 for Identification.

(The tracing referred to was marked Territory's Exhibit 3 for Identification.)

Q. (By Mr. Flynn): Mr. McKeague, I show you Territory's Exhibit 3 for Identification and ask you whether it does not appear to be a tracing of the map or sketch shown on Grant 3437.

A. It does.

Q. I will now lay this tracing over the map or sketch accompanying Grant 3437, and ask you whether the lines showing the boundary of Kahanui 1048 acres are not virtually or substantially identical with those in the grant? [136]

A. Substantially, it is.

Q. I will now return your attention to Territory's Exhibit 2 for Identification, and ask you whether this tracing, which is now laid over the 1886 map of Kahanui or rather the 1886 Government map by M. D. Monsarrat, with reference specifically to that portion marked "Kahanui 1048 acres,"——

Mr. Cass: If the Court please——

The Court: Let counsel finish his question.

Mr. Cass: I thought he had finished.

Q. (continuing): ——isn't very similar to the tracing which was found to be substantially identical with the grant?

Mr. Cass: If the Court please, this is way be-

(Testimony of Bernard H. McKeague.)

yond direct examination and cross-examination. The witness testified that he had not seen it. Now if it is the intention of the Government to prove that this map was in existence, and it was a tracing, it is not a part of the cross-examination of this witness. The witness has testified that he had not ever seen such a map and had no reason to believe it is a tracing. The fact that it is a tracing is not part of his testimony. [137]

* * * * *

The Court: I don't have any notes on this witness's testimony that he referred to this particular map.

Mr. Flynn: No. You are correct, your Honor. He says he did not. I now want to show it to him for the purpose of proving, even on the cross-examination of this witness, that the map contained in Grant 3437 was that on record in the Government Survey Office at the time this grant was issued. [139]

The Court: I understand that. The objection goes to your doing it on cross-examination. That is the objection.

Mr. Flynn: I submit it is absolutely proper cross-examination when everything this surveyor did and has testified to as doing in establishing the boundaries is now to be considered.

Mr. Cass: But what he didn't do cannot be brought into the record for the first time on cross-examination.

The Court: The objection is sustained at this time.

(Testimony of Bernard H. McKeague.)

Mr. Flynn: Note an exception.

The Court: It is improper cross-examination.

Mr. Flynn: Note an exception, if the Court please.

The Court: An exception may be noted. I do not mean you are precluded from any showing you want to make during the course of this hearing, Mr. Flynn, on any proper sequence of testimony, but on the grounds of the objection made, as being improper cross, as I understand the rule the objection must be sustained.

Mr. Flynn: This concerns my recollection only slightly, but I want it clarified.

Q. (By Mr. Flynn): Did you not state a few moments ago, Mr. McKeague, that the map or sketch attached to Grant 3437 showing Kahanui 1048 acres appears to be substantially the same as that shown on this registered map dated 1886?

A. The boundary along the southerly and south-westerly sides seems to show and the boundary along Waikolu Valley, Waialeia Valley and Waihanau Valley in a general way, yes.

Q. Now, having seen the map of 1886 and having examined the sketch plan or map attached to Grant 3437, are you not prepared [140] to state that the map on Grant 3437 was and did depict just what the Government conveyed to R. W. Meyer in 1889?

A. No.

Mr. Cass: We object, if the Court please. The grant and the tracing are not part of this witness's testimony in chief, nor are they any part of a proper

(Testimony of Bernard H. McKeague.)

cross-examination nor are the maps themselves admissible on direct examination. So the opinion solicited from this witness as to the amount of land conveyed, and so forth, goes way wide of his direct examination.

Mr. Flynn: On the basis of what counsel is saying, your Honor, I am virtually authorized to make a motion to deny the application for registration now, because there is not a sufficient survey to back up the application. That is an alternative to a ruling of the Court that the entire survey and all matters pertaining to it are before the Court on direct examination and therefore open to cross-examination.

Mr. Cass: But counsel is trying to put in something here that the surveyor said he never considered in making the survey.

The Court: That is the point.

Mr. Flynn: Then it is very proper to show that he should have considered it and on cross-examination it is proper to do that.

The Court: It is definitely premature. The objection is sustained.

Mr. Flynn: Note an exception.

The Court: An exception may be noted. [141]

* * * * *

Q. (By Mr. Flynn): Will you return to the map, please, Mr. McKeague? Calling your attention to the top edge of the pali as shown on your map, from Monsarrat's Point X, following around to the point where you depict the extreme northerly boundary of Grant 3437, can you estimate the drop from the

(Testimony of Bernard H. McKeague.)

top of the pali to the stream on the westerly side of the stream? You may refer to your contour map if it will be of any assistance to you.

A. That means down to the floor of the valley from this point here, which is at the end of the course marked 1387.3, down to the floor of the valley?

Q. To the point where you put the boundary there, I believe that is at the head of the first falls as you come up from Makanalua. Is that correct? Or the third falls as you go down from the intake?

A. Oh, yes. The third falls. That is right. Six hundred feet.

Q. Six hundred feet?

A. Oh, no. That is to the very bottom. It is four hundred [142] feet.

Q. Four hundred feet from the top edge of the pali?

A. That is right.

Q. To the point at the head of the Big Falls?

A. As shown on my map, yes.

Q. Four hundred feet?

A. That is right.

Q. Now, the drop from the pali at approximately Point K, M. D. M's Point K, to the stream.

A. About two hundred feet to two hundred fifty feet.

Q. About two hundred fifty feet?

A. Two hundred to two hundred fifty feet.

Q. Is this the stream as shown on your contour map, which I am pointing to, just above the word or figures here, "2300," which is about an inch below

(Testimony of Bernard H. McKeague.)

the word "Waiau," where it reads "Area 49 acres"? Am I pointing to this properly?

A. Yes, that is the stream bed.

Q. Yes? A. Yes.

Q. You say from the top of the pali to the stream bed at Point K is around 250 feet?

A. Yes.

Q. These are 100-foot contour lines, are they not, on your map? A. That is right.

Q. I follow this 2600-foot contour line, which is slightly below the top of the pali. Is that correct, at Point K, approximately?

A. Yes, that is right. [143]

Q. And then following along the 2500-foot line?

A. That is right.

Q. 2400-foot line? A. Yes.

Q. 2300-foot line? A. Yes.

Q. And then the stream bed? A. Yes.

Q. Isn't that 350 feet, then?

A. From this point. That is right.

Q. From the top of the pali?

A. In that particular spot.

Q. Instead of 250 feet?

A. That is compiled from the U. S. Geological Survey map, and I did not make any observation as to the relative difference in elevation from the top of the pali down to the stream bed.

Q. I only asked if it was shown on your map. I wanted to correct the 250 to 350 feet. Three hundred and fifty feet is now more accurate, is it not?

A. My answer is the same. The difference in

(Testimony of Bernard H. McKeague.)

elevation is from the records of the U. S. Geological Survey, and I did not make any observation on it from the top edge of the pali to the bottom of the stream bed.

Q. Is it not shown on this map as more like 350 feet rather than 250 feet? A. That is right.

Q. Look at your blueprint, marked Exhibit M. You show an extensive ridge coming down to the floor of the stream at a [144] point——

Mr. Cass: Approximately Waiau Falls, isn't it?

Q. (By Mr. Flynn): ——very well. At a point approximately Waiau Falls. Is that correct?

A. That is right.

Mr. Flynn: I might note that there isn't any Waiau Falls noted here or anything of the sort, so I will say just above, on this map, the letter R, which letter R is followed by the letter W. Is that correct? A. That is right.

Q. Did you from your own work arrive at those hachure line divisions or did you take that from other material available to you?

A. They do not follow any recorded notes. That is just a draftsman's indication that there is a difference in elevation in the direction downward from the part that is a little to the right of the distance marked 424.60 feet down towards the stream bed.

Q. Where did you get it to put it on your map that is submitted with this application?

A. My observation on the ground that there is a drop from that point down to the stream bed, and

(Testimony of Bernard H. McKeague.)

as I said, there is nothing recorded as to that difference in elevation.

* * * * * [145]

Q. From observations on the ground, your map shows a lack of any ridge coming down near the stream at this point we have agreed is approximately Waiau. Is that correct?

A. That is right. And also, it could have been followed all the way up because the different spurs coming down to the stream bed. They are throughout the whole floor of this gulch. And hachures do not pretend to show the exact spurs or gullies or ridges.

Q. Without pretending to show them exactly, they are supposed to be fairly consistent, are they not, so that if there is a spur on this side comparable to one on this side, and I am referring to both sides of the stream at approximately Waiau, should it not be shown? [146]

A. If it is very significant and if it is needed for mapping purposes, I show it. Any more than I disregard showing some gullies up here. I was only showing the general terrain, if it is possible to do so.

Q. Do you recall, from observation, whether or not there is a spur coming well down beyond the point shown on your map and nearly to the stream bed at approximately Waiau, a spur coming from the east to the west?

A. For about an inch, starting from part of the stream bed immediately above the letter "R", which is before the letter "W", there is a spur that starts

(Testimony of Bernard H. McKeague.)

from there and goes on up for about an inch on the map and it dissipates, as far as I can remember.

Q. But you did not put any part of that spur on your map? A. I did not.

* * * * * [147]

Q. (By Mr. Flynn): Mr. McKeague, referring back to your map, which is Exhibit A, we have previously referred to the language "Boundary follows along the top edge of pali," which is contained on your map and set forth just southeasterly of the cross on rock or M. D. M's X. Am I correct so far?

A. The southerly side, yes.

Q. Yes, the southerly side.

A. The southerly side of the line indicated by the line 289 degrees 53 minutes, 1587.3 feet.

Q. You stated that the top edge of the pali does continue beyond the spur ridge which goes down to the Big Falls and does continue beyond and approximately through Point K and continues on around until it hits the point marked M. D. M's Y? Correct? A. That is right.

Q. Did you walk along the top edge of the pali in the course of your work and continue beyond the spur ridge going down to the Big Falls and beyond Point K?

A. I did. Not in its entirety, but inspecting a point here and there.

Q. But you did walk beyond Point K?

A. That is right.

Q. Did you walk as far as Point marked M. D. M's Y? A. No. [148]

(Testimony of Bernard H. McKeague.)

Q. Did you walk as far as a point which would be just west of the spot we have now marked as Waiau Falls? A. I did.

Q. Would you, to the best of your recollection, state that you did walk along the top edge of this pali?

A. I went about two or three hundred feet beyond the point marked by the dot and indicated by the letter B, in a southerly direction.

Q. The letter B you have just inserted in pencil, have you not? A. That is right.

Q. On your map, Exhibit A?

A. That is right.

Q. As you walked along this top edge of the pali and as you reached the spur ridge or the area where the spur ridge descends down to the Big Falls, what is the visibility to the point down to the spot you have referred to as the Big Falls?

A. I would estimate that I could see perhaps 300 to 350 feet from the top of the spur, in that general direction.

Q. Can you see the bottom of the valley at the Big Falls from up there? A. No.

Q. You cannot see it? A. Cannot see it.

Q. Let's assume a surveyor is following along the top edge of this pali, and continuing beyond the spur ridge that leads down to the Big Falls, and continues to the point marked K, which you have previously stated is M. D. M's survey point K. I gather from what you have stated a minute ago the there would not be any ascertaining from this top

(Testimony of Bernard H. McKeague.)

of the pali as to [149] whether or not the valley is impassable at that point referred to as the Big Falls? Correct?

A. Will you start your question all over again? It is too long and I cannot follow your continuity at all.

Q. I will try to put it this way. A surveyor is confining this present trip to a walk along the top edge of the pali, and he goes beyond this spur ridge and to Point K. Correct?

A. You mean in that neighborhood? You are assuming that?

Q. I am assuming this, yes.

A. That is an assumption?

Q. That is right. That the surveyor looks down into the valley as he takes that walk; is he able to see whether that spot at the Big Falls is passable or impassable?

A. No, he cannot determine that.

Q. Now, referring to the marks in red dotted lines or dash lines on your map, you have stated that these were points and plottings in M. D. M's survey field book. Is that correct?

A. That is right.

Q. From your examination of his field notes I believe you stated that Mr. Monsarrat never went down into this valley. Correct? By this valley I am referring to the area where the Big Falls is located.

A. I could not find anything in his records or field notes to indicate that he went down to the bottom of that valley.

(Testimony of Bernard H. McKeague.)

Q. Did you find anything in his field notes or any of his records to indicate that he ever went below the top edge of the pali, following the line we have previously talked about, that is to say, from M. D. M's survey Point X through K and again following back down to M. D. M's Y? [150]

A. There is nothing I can find in the records to show that M. D. Monsarrat left this plateau and entered the floor of the valley at any one point.

Q. Or at any point at all. Isn't that correct?

A. To the best of my knowledge, that is right.

* * * * *

Q. You did state, did you not, that from this point where the spur ridge goes down to the Big Fall, the Big Fall itself—The head of the Big Falls is not visible, isn't that so? What was your purpose in checking out and plotting—

A. (interrupting) From that point, that is right.

Q. (continuing) —all the lines in red which you found [151] to be in Monsarrat's field book?

A. I wanted to know just where the points were that are shown in his field notes actually on the ground by plotting so that I could more graphically see what he had done.

Q. Why did you want to see what Monsarrat had done?

A. Just naturally, to see how good his work was as it pertains to the boundaries of Kahanui, and if it has merit in that respect.

Q. You understood then that Monsarrat did

(Testimony of Bernard H. McKeague.)

draw the description for Kahanui or did write the description for Kahanui? A. Yes.

Q. Did you also understand that he had drawn a map of Kahanui?

A. No. Not at the time he wrote the description. I have no way of knowing when that map was made or whether that map was made by Monsarrat himself or whether it was plotted by a draftsman, and it was marked on the map, the blueprint which I saw indicated it was a map by Monsarrat.

Q. Will you indicate that blueprint, please?

A. It is a sectional print of a place as I recall I got from the Survey Office and just made a sectional print, and on that sectional print it did not have all of the information as to date and all that, but I did know that map was a result of Mr. Monsarrat's work.

Q. And it may have been Mr. Monsarrat's map?

A. He may have been the maker of the map and he may not have been the maker of the map.

Mr. Flynn: I would like to have this document marked Territory's Exhibit for Identification.

The Clerk: Exhibit No. 4. [152]

The Court: Territory's Exhibit 4 for Identification.

(The document referred to was marked Territory's Exhibit 4 for Identification.)

Mr. Flynn: For the benefit of counsel and the witness, I will explain what that is.

(Testimony of Bernard H. McKeague.)

Mr. Cass: This is a tax map.

Mr. Flynn: No. That is a reduction made from the map of Mr. McKeague's which is filed with this application for registration, a reduction in scale from the original map on file with this case, to a scale of 2,000 feet to the inch.

Mr. Cass: A photostatic reduction, isn't it?

Mr. Flynn: Correct, yes.

Q. (By Mr. Flynn): Mr. McKeague, I show you Territory's Exhibit 4 for Identification, which I have claimed is a reduction, a photostatic reduction of your map filed with this application No. 1483.

The Court: Exhibit M.

Mr. Flynn: Exhibit M is the blueprint of it. The reduction to which I am referring is from the original map or the original tracing filed with the application.

Q. (By Mr. Flynn): As I was saying, this purports to be or is represented by me to be a reduction of 2,000 feet to the inch of your map. I will ask you whether from an examination of this exhibit you are satisfied that my claim is correct?

A. That is right.

Q. We have previously discussed Territory's Exhibit 3 for Identification, which is a tracing, and you stated, upon seeing this tracing laid over the map or sketch accompanying the grant, that it is substantially identical with the map [153] or sketch accompanying the grant. Correct?

A. With the qualification that it is correct as to the boundary on the southerly and southwesterly

(Testimony of Bernard H. McKeague.)

sides and very nearly the same as it follows Wai-kolu Valley and Waihanau Valley.

Q. Did you not also say that it was substantially identical with the entire northern boundary as shown on the map or sketch accompanying the grant? A. Substantially, yes.

Q. Now, I will lay this tracing over Territory's Exhibit 4 for Identification, which is a 2,000-foot to the inch reduction of your map filed with this application, and ask you how the boundaries as shown on the tracing compare with the reduction of your map?

A. Except along the southwesterly and southerly boundary it is not identical.

Q. There is a very wide differentiation along the northern boundary, is there not?

A. That is right.

Q. Mr. McKeague, I would ask you to trace on this tracing in a dotted line your boundary in the Waihanau Valley area.

Mr. Cass: Do you have a red or blue pencil or a colored pencil? If any tracings are made over that——

The Witness: This is a blue one.

Q. (By Mr. Flynn): You use your own judgment in fitting the lines that do fit together and try to be accurate.

A. Will you repeat your question, please?

Q. I ask you to trace the boundary as shown on the reduction of your map on this tracing. I am confining it to the [154] extreme northern point,

(Testimony of Bernard H. McKeague.)

northwesterly point of the boundary of Apana 3 of Kahanui. A. Meaning here? (indicating)

Q. Yes.

Mr. Cass. All of it.

Q. (By Mr. Flynn): Maybe you had better examine that a little bit.

A. Do you want me to continue through on around?

Q. As far as you can, yes. I am referring specifically to Grant 3437.

A. Then I will have to pick it up here, where it touches the tracing. From here on up to here.

Q. No. Just a minute. Your map does not distinguish between 3437 and Grant 3539, does it?

Mr. Cass: I don't know.

A. That is right.

Mr. Cass: No line is drawn on the original map between the two grants on that boundary.

Q. (By Mr. Flynn): Then I will ask you to demonstrate the boundary between Point X and approximately the middle of the ridge known as Grant 3539, as shown on your map. Do you follow me now?

A. No. I didn't quite get the question.

Q. I am asking you to trace or rather to mark on this map——

A. On the tracing?

Q. On the tracing, the boundary of Kahanui between Monsarrat's Point X and Monsarrat's ridge Point C, as shown on your map Exhibit A.

(Witness marks on exhibit.) [155]

Q. That is far enough as far as I am con-

(Testimony of Bernard H. McKeague.)

cerned. Now, if you will draw on this tracing, while holding the tracing over the Territory's Exhibit 4 for Identification a dotted line along the top of the ridge, which is Grant 3539, to its extreme southerly end or the equivalent of Monsarrat's ridge Point A as shown on your map Exhibit A, a dotted line, however it shows on your own map.

A. I just wanted to get the direction.

Q. Now, will you please draw a dotted line between the boundary as shown by you on the westerly side of Grant 3539 to the line you have just drawn, which is the pali along the easterly side. A dotted line. Thank you.

Now, as we have seen, this tracing is on a scale of 2,000 feet to the inch. Correct?

A. That is right.

Q. The boundary shown on the tracing, which is also that on the map or sketch attached to Grant 3437—examine it from the beginning point on the north boundary, which is Point X. It goes southerly beyond your boundary point approximately 2,000 feet, does it not? A. That is right.

Q. And the boundary you make beginning at that point of differentiation we have just referred to turns easterly and goes over to the offset ridge in a distance of approximately 1100 or 1200 feet?

A. That is right.

Q. Now, looking at this tracing, will you identify approximately on the tracing Point K as it appears on your map Exhibit A. Hold this however you find it convenient to do so. [156]

(Testimony of Bernard H. McKeague.)

A. About here or in here (indicating).

Q. That is approximately Point K?

A. Yes.

Q. Very well. Will you place on this tracing as approximate as you can, from examining your map Exhibit A, M. D. Monsarrat's Point A?

A. It would be difficult for me to get the relative position of this ridge here with respect to the intersecting lines and the grant lines.

Q. Can you approximate it? You will not be held to any precise location. Or if you like, you may place it on Territory's Exhibit 4 for Identification and locate it that way. Mark it "A" please.

Point "A" then on this sketch comes out directly at the line where you show the termination of the—correction—the southerly direction of the ridge which is Grant 3539. Correct?

A. That is right.

Q. And Point "A" likewise comes out directly at a point on the line, the northern boundary line of the tracing of Grant 3437. Correct?

A. That is right.

* * * * * [157]

Q. We have previously discussed your map with reference to the hachuring showing the spur ridge which descends to Waiau Fall from the top of the ridge which is a portion of Grant 3539, and I believe you stated that the spur ridge does descend farther than is shown by hachuring on your map. Is that correct?

A. That is right.

(Testimony of Bernard H. McKeague.)

Q. Doesn't that spur ridge extend just about to the stream itself? A. That is right.

Q. Will you take a blue pencil and hachure in the balance of that spur ridge?

Now, from the point you have previously referred to as the farthestest southerly point in the stream to which you walked, to this spur ridge descending from the 3539 pali would be approximately a distance of a thousand feet, would it not?

* * * * * [158]

A. As an approximation, since I indicated that perhaps this point, 191 degrees shown on the map, was the spot I stopped, I would say that is about 600 feet.

Q. About 600 feet? A. Yes.

Q. Would it be reasonable to say that this other spur descending from the point we have marked as "B" was less than 500 feet in a direct line from the point where you stopped?

A. Yes.

* * * * *

Q. Scale first from this numeral number 9 in red pencil to [159] the end of the spur which descends from the westerly pali of Point "B", which I shall mark with a "C", in black pencil. After that scale in a virtually direct line to the upper portion of the spur which descends from the easterly ridge or the ridge which is a portion of Grant 3539 to the stream in the center of the valley at a point which I shall mark "D" in black pencil.

A. The distance from red No. 9 to the point

(Testimony of Bernard H. McKeague.)

marked in pencil "C", which is easterly and below Point "B" is 500 feet by scaling; this distance "D" which is the beginning of the spur towards Waiau Falls, is about 750 feet.

Q. Very well. Now, from this point marked in red pencil with the numeral 9, looking southerly along the continuation of the stream and the ridges, the spur ridges on both sides of the stream, are you able to view the two overlapping ridges shown here, being the ridge descending from the point "B" on the westerly pali to the floor of the stream and the ridge descending from the easterly pali of this valley, which is Grant 3539?

A. Simplifying your question, do I understand you correctly, you just want to know the view where I stopped, from red figure 9 to Point "C" to "D"?

Q. Yes.

A. I do not recall at this time whether I was able to see that spur at the end of Point "C" and the beginning of the spur that goes to the Waiau Falls, starting at Point "B". I did, however, go to a point which I marked on my notes here as Fall No. 4, starting from the intake and counting the falls as I went up, and it is quite possible I could see [160] this Point "C" and to the top or what I considered the top of—at the Point "D".

Q. Is it not also possible that you as you were standing near or even in the stream at Point 9 and looking southerly you saw these two overlapping ridges in a formation which would appear to be

(Testimony of Bernard H. McKeague.)

the end of this valley where the stream is running?

A. No, because the other parts of the stream bed are comparable to that; that winds back and forth with spurs supposedly bending the stream bed.

Q. Would it not be possible from several points along that stream, looking southerly, to see overlapping ridges which would appear to close out the valley as you are standing in it there?

A. There are several points that would appear as such.

Q. And from down there at various points along the stream there are several points that would appear to be a head of the valley that you are down in; is that correct?

A. No. I would consider it as head of the valley.

Q. I am only asking you, if as you stand down in the stream, and looking up towards the overlapping ridges that appear to close out the valley that you are standing in, such could have been a head of the valley to a person that was making that view? Correct?

A. No, I would not get that impression.

Q. But you did state there are points, both this one shown by "C" and "D" and other points, where the stream turns which, as you look at them appear to close out the valley that you are in? [161]

A. If I understand your question, I lose sight

(Testimony of Bernard H. McKeague.)

of the stream bed. That is right, because of the abrupt change in the direction of the stream bed.

* * * * *

Q. I am asking you if the hachuring in the blue pencil marks fits the condition on the ground better than the lack of it previously contained in your map?

A. As it pertains, the spurs that starts at Point "D" and goes to Waiau Falls, yes; but to say there is a ridge that comes down from the top, where M. D. Monsarrat's Ridge Point A is, and continues on down through "D", no.

Q. You don't recall any such ridge?

A. No. There is no such ridge.

Q. Any such spur ridge?

A. No spur that starts from the very top. The beginning of the spur that starts from Waiau Ridge starts from "D". It sort of flattens out and dissipates itself. If you start from Waiau Falls and work your way up to "D".

Mr. Flynn: I want these series of photographs, all pasted upon heavy transparent paper, to be marked as Territory's Exhibit 5 for Identification.

The Court: Territory's Exhibit 5-A, B, C. [162]

Mr. Flynn: Territory's Exhibits 5-A, B, C.

The Court: Territory's Exhibit 5 for Identification, 5-A, 5-B, 5-C, from left to right.

(The photographs referred to were marked for identification as Territory's Exhibits 5-A, 5-B, and 5-C.)

(Testimony of Bernard H. McKeague.)

Q. (By Mr. Flynn): I will ask you to examine each of these three pictures contained in Territory's Exhibit 5 for Identification, Mr. McKeague, and ask you whether you can identify any of the areas as including those which we have discussed as being shown on your maps and as to which you have been on the ground?

(Witness examines Territory's Exhibit 5 for Identification.)

Mr. Flynn: If I may be allowed to help you.

The Court: That is necessary for such a greatly reduced photo.

Mr. Flynn: I would be very glad to do it.

Q. (By Mr. Flynn): I will refer you to the ridge we have previously shown to be Grant 3539. I will point to this area just above the center line of the entire photo, on the first picture, which is Territory's Exhibit for Identification 5-A, and advise you that that is the ridge area contained in Grant 3539 except for the extreme southerly portion of that ridge or the very narrow ridge area to the south of the broader area. I will then point out to you that the second picture, Territory's Exhibit 5-B for Identification, is a continuation of the same area, the overlapping being approximately one-half of the first picture; and similarly, the third picture is a continuation of the second, the overlapping again roughly [163] being one-half of the second picture. And I will call your attention to the stream or stream bed noticeable at the extreme left-hand side of the first picture, Territory's Exhibit 5-A,

(Testimony of Bernard H. McKeague.)

tracing it along as I see it, and indicate to you that this point at the extreme right-hand side of the picture 5-A is where you have placed your boundary or the area we have previously referred to as the Big Falls, and show you the same point in the second picture, which is very near the center of this picture, and point out to you that in the third picture that area is already off the picture.

* * * * * [164]

Q. (By Mr. Flynn): Mr. McKeague, you have shown on the picture 5-B, which we are now looking at, a point which you are satisfied is the location of the high waterfall. Correct?

A. That is right.

Q. From which you can follow the course of the stream upward, can you not?

A. That is right. [172]

Q. Will you follow slowly along the course of the stream and demonstrate to the Court, counsel, and myself?

(Witness indicates on exhibit.)

Q. (By Mr. Flynn): Will you stop at Waiau, if you can identify it to your satisfaction, Mr. McKeague?

A. Right here (indicating).

Q. Now, referring to your map Exhibit A, the point on this picture at which you have stopped is identical with the pencil mark on your map Exhibit A as Waiau Falls?

A. That is right.

Q. I will call your attention to the picture and ask you whether the ridge or spur ridge from that

(Testimony of Bernard H. McKeague.)

point upwards to the ridge which is Grant 3539 is not plainly visible?

A. For a short ways up, maybe two or three hundred feet, perhaps four hundred feet.

Q. Now, I ask you whether at that same point there is not a very marked overlapping between that ridge and the ridge which descends to Waiau Falls or just north of Waiau Falls from the top of the ridge on the westerly side of that valley?

A. There is.

Q. A very marked overlapping. Correct?

A. That is right.

Q. Then, from that picture are you satisfied that the spur ridge shown beginning from the spot Waiau Fall on your map Exhibit A and going upward in an easterly direction to the ridge of Grant 3539 is now a much more accurate picturization on your map of the true condition on the ground?

A. That is right.

* * * * * [173]

Redirect Examination

Q. (By Mr. Cass): Beginning at the cross on a rock, from and whence the description runs "Thence around the head of Waihanau Valley and Waialeia Valley," is there any difference between the steepness of the pali on the side that you have included in the map as distinguished from the side that you have excluded from the map?

A. There is a definite difference, in this respect, that one would not venture in this particular case just above the cross on rock and above M. D.

(Testimony of Bernard H. McKeague.)

M's X and venture down towards the bottom from this point, whereas above this point it seems like a good many places you can descend into the bottom of the valley from the top.

* * * * * [175]

Q. Now, you examined Pease's notes and particularly that part of Pease's notes you were cross-examined on from the point Hoalae to the head of the gulch. Is there anything in Pease's notes or from the observations taken by Pease, if any, that would ever indicate that Pease ever went up on top of the plateau?

A. No, there is nothing that I can tell from his description from the map that he did go up to the top of the plateau.

* * * * * [176]

Q. Is it possible to see this three-acre piece referred to here from any point on the bottom of the canyon?

A. I have no way of knowing; I wasn't anywhere near the bottom of the canyon.

Q. Now, this tracing and the 2,000 feet to the inch reduction of the map that we offered for identification here, I will ask you to complete in blue pencil on your overlay the boundary—you have already traced in the boundary from here to here. Now, I will ask you to trace in the boundary to **Kaluahauoni** as it appears on the overlay the same way, with the blue pencil or with the red pencil.

* * * * * [177]

Q. (By Mr. Cass): Now, this red line that ap-

(Testimony of Bernard H. McKeague.)

pears upon this tracing, Territory's Exhibit 3 for Identification, is an overlay of your map reduced to 2,000 feet to the inch scale over the map, the tracing, as it existed? A. That is right.

Q. This area in here has been referred to as a pali, pointing to the tip of the larger portion of Grant 3539, coming back to the three-acre piece. What is the character of the pali towards Waialeia? A. Very steep.

Q. Very steep. What is the character of the pali on the side towards Kahanui?

A. Accessible on foot.

Q. It is accessible on foot clear up to the top?

A. Yes. * * * * * [178]

Recross Examination

Q. (By Mr. Flynn): Mr. McKeague, in your redirect examination you referred to the description by Pease. I will ask you to look at that description now. You read a portion of that description which has to do with the easterly boundaries of the lands of Makanalua, the ahupuaa of Makanalua, one of the portions of the description reading as follows:

“Thence S. 12 degrees E. 15 chains and thence to the top of the mountain ridge called Hoalae, thence following along the top of the Pali bounding Makanalua gulch or ravine on its easterly side, to a certain mountain peak, at the head of said ravine, called Kaulahuki.”

Will you now read the description for the west-

(Testimony of Bernard H. McKeague.)

erly [180] boundary of the lands of Makanalua?

A. (Reading from document): "The westerly boundary of this land commences on the sea, at the corner of land called Kalaupapa, at a certain large flat stone, laying a short distance above the sandy beach, running from thence S. 81 degrees 30 minutes E. 14.81 chains to a certain Hala tree, thence S. 86 degrees E. 1.42 chains, S. 25 degrees 30 minutes E. 14.85 chains, S. 40 degrees S. 8 chains, S 27 degrees E. 23.10 chains. S. 18 degrees E. 36 chains, S. 19 degrees E. 30.30 chains, always following an old path, (overgrown) to a certain Hala tree, thence S. 47 degrees 30 minutes E. 5.60 chains and S. 7 degrees 30 minutes E. 24.54 chains to the river at a certain bend, from thence following along southerly bank of the river, S. 45 degrees E. 29 chains, to the foot of the mountain ridge called Ililika, thence to the top of Ililika and from thence following along the top of the Pali bounding Makanalua gulch or ravine, on the west, to a certain mountain peak at the head of said gulch called Kaulahuki, comprising an area of twelve thousand five hundred acres, more or less. W. H. Pease".

Q. Yes, now Mr. McKeague, examining this description by Pease, you find that on both the easterly and westerly boundaries of the lands of Makanalua the course requires the going along the top of the pali to a mountain peak called Kaulahuki, correct?

A. That is a portion of it, yes.

Mr. Flynn: No further questions, your Honor.

The Court: Next witness. * * * * [181]

THOMAS P. CUMMINS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Cass): Are you related to the Meyer family? A. By marriage.

Q. How long have you been married to a member of the Meyer family?

A. Thirty-four years.

Q. Are you familiar with the lands of upper Kahanui, that is what is known as mauka Kahanui? A. I am.

Q. How long have you been familiar with that land? A. Since 1916. * * * * *

Q. Now [196] in your early acquaintance with the land, did you ever note the fencing of this area, where the fences were?

Mr. Flynn: If the Court please, I want to make an objection as to this all being incompetent, irrelevant and immaterial to this boundary question.

The Court: The purpose, Mr. Cass?

Mr. Cass: Why in the letter of Meyer requesting the allotment of additional land appears the statement that the awarding of that additional land would save fencing. Now the question of what is fenced and what was considered necessary to fence as to do with Meyer's mental conception of the area of land which he was going to get. I wish to prove by this witness the nature and extent of the fencing of this particular area.

(Testimony of Thomas P. Cummins.)

The Court: From 1916 forward?

Mr. Cass: And what he knows of old fences that might have been in existence at that time.

The Court: Objection overruled.

Mr. Flynn: Note an exception, if the Court please.

The Court: Exception may be noted.

Mr. Flynn: May I make a further objection that any data as to fencing or other outside material, that is to say, outside the description and map accompanying the grant, is inadmissible until such time as the description and map are found to be in error.

The Court: All right, the objection on that ground is also overruled. [197]

Mr. Flynn: Exception, if your Honor please.

The Court: Exception may be noted.

* * * * * [198]

Q. (By Mr. Cass): Was there any fence anywhere else on the boundaries of this land?

A. No, I didn't see any other fences. There were no fences in this section here (indicating) at all. There were none on this ridge nor none on this edge here (indicating). In this section here there were, and there were some ironwood trees in this section (indicating), I don't know whether built for windbreak or reforestation or what. There was kind of a dense growth of big trees in that section.

Q. Were there cattle on the land when you knew it?
A. There were.

(Testimony of Thomas P. Cummins.)

Q. As to the pali boundaries, were there any fences on the pali boundaries?

A. You mean in this?

Q. Yes, there and across where the pali is.

A. No, there were no fences at all. After you left the property on this side (indicating) and went down that gully, you come up into this section here (indicating), there were no fences until you get around in this area here (indicating).

Mr. Cass: That's all.

Cross Examination

* * * * * [199]

Q. (By Mr. Flynn): From where the cattle left Grant 3437, was that not somewhere in the neighborhood of the part of the Kalamaula road and from north to south? I ask that because I believe that is where you pointed.

A. That's right. They came in from this direction to the lower lands of Meyer.

Q. And that roadway did not connect at all with this point?

A. Not that road, not the way they brought the cattle in. It came in this direction (indicating), towards the Meyer lands at Kalae. That is the beginning of the Meyer lands.

Q. Yes. Now did I understand you to say you have seen cattle taken from this very point, Kaohu, to this area shown as around point X in rock?

A. No, I have seen them brought out from this area (indicating) to this area (indicating).

(Testimony of Thomas P. Cummins.)

Q. By 'out of this area' you have referred to the small area of Kahanui immediately above the central part of [202] Kalamaula and immediately to the right of the mark plus or X in rock?

A. That's right.

Q. Now there is a mere trail, is there not, between Kaohu and the plus in rock?

A. About four feet wide in places.

* * * * * [203]

CHRISTINA M. TUI TELE

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Cass): Are you a member of the Meyer family of Molokai? A. Yes, I am.

Q. What relation are you to Rudolph W. Meyer, Sr.? [205] A. He is my grandfather.

Q. Do you know when he first came to this country?

A. Well, when he first came to this country I wasn't born then, you see.

Q. In your family history, your knowledge of the family, can you tell us when Mr. Meyer approximately came to this country?

A. Oh, many, many many years, but I don't really know what date or what year.

Q. How old are you, please?

A. I am sixty-two years old.

Q. Born in 1887?

(Testimony of Christina M. Tuitele.)

A. Yes, December 27th.

Q. Where were you born?

A. I was born in Honolulu here and raised on Molokai.

Q. Where in Molokai? A. Up at Kalae.

Q. Where is Kalae in relation to the Meyer lands? A. Well, just Kalae, Molokai.

Q. Do you know where Kahauni 3 is?

A. Yes, I do. We used to roam in there too and up at Kahanui.

Q. When did you first become acquainted with upper Kahanui?

A. Well, when grandfather Meyer was alive, well, I was old enough to understand and to know when he asked us grandchildren to go up to the mountains with him, with our uncles and aunts and cousins. [206]

Q. How did you go?

A. Well, we went on a bullock cart as far as the bullock cart could go. Then we would leave the bullock cart way up on top of a big mountain, and we would walk down this great big valley into this other side. That is the whole of Kahanui.

Q. Now do you know where the Big Fall is? The big waterfall? A. Yes, I do.

Q. Where was that in connection with those trips with your grandfather?

Mr. Flynn: Excuse me. I want to make an objection to the competency, relevancy and materiality, your Honor, similar to my objections before that the testimony of this nature is inadmissible

(Testimony of Christina M. Tuitele.)

for purposes of establishing boundaries where the description and map in the grant has not yet been disproved or shown to be inadmissible.

The Court: Objection overruled.

Mr. Flynn: Exception please.

The Court: Exception may be noted. Proceed.

Mr. Cass: Will you read the question?

(The question was read by the reporter.)

A. Kahanui, yes. My grandfather always told us up at Kahanui there.

Q. Now did you ever go to the neighborhood of these big waterfalls?

A. Yes, we did. We used to go on picnics. Yes, and [207] grandfather used to just tell us and show us what we owned and what we didn't own.

Q. Now were there any marks there at that time in existence that he pointed out?

A. Well, yes, he did. He had landmarks up, and he had put kapu signs up. I remember that so well.

Q. Where were those kapu signs in relation to the Big Falls?

A. Well, those signs were put up right on top of the falls to keep the lepers from going up to our land where the water was. Grandfather didn't want the lepers to go up in there.

Q. How near to the top of the Big Falls were these kapu signs?

A. Oh, I should say, oh, about two feet.

Q. About two feet from the top of the falls?

A. Yes.

Q. And were the lepers allowed to go up on top

(Testimony of Christina M. Tuitele.)

of the falls? A. No, they were not allowed.

Q. How long did you continue to be familiar with this area? By the way, you were married before you married Mr. Tuitele, were you?

A. Yes, I was married to Dr. Goodhue.

Q. Did Dr. Goodhue come to Molokai to court you and marry you? A. Yes, he did.

Q. Where did you conduct your courtship?

A. Up at Kalae. [208]

Q. Up at Kalae?

A. Yes, at Kahanui, I guess.

Q. Did you go on picnics with Dr. Goodhue?

A. Yes, many times, and we used to go out shooting all around those hills and mountains, and he shot many a deer and goats.

Q. Did you go up to the Big Falls?

A. Yes, I did.

Q. How old were you then?

A. At that time I was going onto 18.

Q. Going onto 18 years old? A. Yes.

Q. Now Dr. Goodhue, did he take you right back to Honolulu when he married you?

A. No, he used to be the physician for the leper settlement, and I lived there with him for about 30 years.

Q. In the leper settlement?

A. In the leper settlement. And every Saturday or Friday afternoon he and I would go up and spend the week end with my mother and father. That is, up at Kalae.

(Testimony of Christina M. Tuitele.)

Q. Did you ever go up the bottom of Waihanau Valley?

A. Well, no, I couldn't get up in there.

Q. You couldn't get up in there?

A. No, but we used to ride, when we used to go hiking up there, we used to walk along the edges, oh yes, from on top, not down below.

Q. Not down below? A. No. [209]

Q. Were there any fences on the edge of the pali?

A. There were no fences up there, but grandfather put these kapu signs along the line because if grandfather was to put a fence up, it would run for miles and miles down big gulches, up and down. He said he couldn't do it.

Q. Did they keep cattle on this land up there?

A. Yes, they did. I remember so well, we used to go up and drive cattle, wild cattle, wild horses and wild turkeys. We raised turkeys up in there.

Q. Where did you go in to get your cattle?

A. Well, we had two ways of getting in there. We used to go through the Molokai ranch, now it is Molokai ranch. The other way was right through down that big valley down through part of Waihanau, up into Kahanui.

Q. You went down to Waihanau Falls and up the other side? A. Yes.

Q. That was the shortcut you drove cattle?

A. Yes, because if we didn't take that shortcut it would take us days to bring the cattle and ourselves down. The trail used to be so narrow. There

(Testimony of Christina M. Tuitele.)

is one place—I can't remember the location—I went by there one day while my uncles were shooting, and I was riding my horse and it got frightened and it jumped to one side; that road was only that wide (indicating) from where it would drop into that big valley.

Q. You brought the cattle up that trail?

A. Oh, yes. [210]

Q. Weren't the cattle pretty wild?

A. Yes, they were very very wild.

Q. What did you do when they were too wild to drive?

A. Well, grandfather and my uncles, they used to get a tame bullock, oxen, and chain the wild bullocks with the tame ones and the tame one would lead.

Q. That would take them up over the trail?

A. Yes.

Q. Did you know Dr. Moritz?

A. Yes, I knew Dr. Moritz when my grandfather used—Dr. Moritz used to be very friendly.

Mr. Flynn: If the Court please, the objection I made before, I would like the record to note runs to all this testimony, and the ruling applies and the exception noted.

The Court: That is correct.

Mr. Flynn: Very well, your Honor.

* * * * * [211]

Q. Now going back to your grandfather, Rudolph W. Meyer, who was your grandmother?

(Testimony of Christina M. Tuitele.)

A. My grandmother, I don't know her Hawaiian name. Her name was Kalama Dorcus Meyer.

Q. Do you know what Hawaiian family she came from?

A. From Pukoo, Molokai, Auntie Bertha knows.

Q. And then your father and your Auntie Bertha are half Hawaiian? A. Yes.

Q. Do you speak Hawaiian?

A. I can speak very little of it, but I understand every word of it.

Q. Now when you were a child at Kalae, were there old Hawaiians around the place?

A. Yes, we had Hawaiians do all the work. There were cowboys. They used to go with Grandfather Meyer. Grandfather used to survey all that property up there. Grandfather was a surveyor himself.

Q. These cowboys, Hawaiian cowboys, that you knew when you were a child, drove cattle into this land? A. Yes, they did.

Q. And brought them back over this path? [212]

A. Yes.

Q. Did you ever learn from them any of the traditions of the boundaries of the Kahanui?

Mr. Flynn: I want to object, if the Court please. The question calls for a conclusion of the witness as to what she was told may have been traditions. It is inadmissible as hearsay.

Mr. Cass: That is allowed in land boundaries.

The Court: The form of the question, Mr. Cass, I think is objectionable. Perhaps you could reframe it.

(Testimony of Christina M. Tuitele.)

Mr. Cass: I was just asking whether she had ever been told anything about the boundaries.

The Court: The objection is to the use of the word traditions.

Q. (By Mr. Cass): Did they ever tell you anything of their knowledge of the boundaries of Kahanui?

Mr. Flynn: I will object again as hearsay, as an effort to bring in kamaaina testimony, which is inadmissible, second-hand.

(Argument on objection.)

Mr. Flynn: My further objection, for clarification is that all such evidence is inadmissible where there is a map and description accompanying a grant on which claim of title is based.

The Court: Objection overruled.

Mr. Flynn: Exception, please, your Honor.

The Court: Exception may be noted. Proceed.

Q. Did they tell you their knowledge of the boundaries of Kahanui? A. Oh, yes.

Q. What did they tell you about the boundaries of the land around the Big Falls in that area?

A. Grandfather and my uncles told his grandchildren that belonged to us.

Q. Well, how about the cowboys? Did they ever tell you anything about it?

A. Yes, the cowboys knew about it too. Grandfather told them what we owned.

Q. Well, the old Hawaiians, did they ever differ with your grandfather on that boundary?

A. No, they never did.

(Testimony of Christina M. Tuitele.)

Q. Now you stated that you went on picnics in Bullock cart? A. Yes.

Q. In your family how early did the children start to ride horses?

A. Well, when I first rode a horse, I was about four years old. We were taught to ride when we were very young, to ride horses.

Q. Did you keep on going in the bullock cart after you learned to ride the horse?

A. No; the older people like my aunties, mother and Grandmother Meyer, they were the ones that rode in the bullock cart then. We rode on horses.

Q. Down to this same place on horses? [214]

A. Yes, exactly.

Q. You started to ride down there just as soon as you were able to ride a horse? A. Yes.

Q. And certainly you were not more than ten years old when you started to ride that way.

A. I was younger than that.

Q. Much younger than that? A. Yes.

Q. So that your recollection of going on picnics down there first in bullock carts starts when you were approximately five years old or younger?

A. Yes.

* * * * * [215]

Q. Is Waihanau in the leper settlement or in the Kahanui land? A. It is in Kahanui lands.

Q. Waihanau, you are sure it is in your own lands? A. Grandfather always told us that.

Q. Were there any fences at all in this valley to keep the cattle down away from the waterfall?

(Testimony of Christina M. Tuitele.)

A. Well, Mr. Cass, we had boundary marks put up, but no fences, because grandfather couldn't get into this valley and up again, because it was so thick with lehua trees and ferns. It was impossible. * * * * * [216]

Cross Examination

Q. (By Mr. Flynn): Mrs. Tuitele, do you remember a location in those lands known as Waihanau?

A. Waihanau?

Q. Yes. A. I think I do.

Q. Can you say approximately where Waihanau was from the Big Falls?

A. Well, all grandfather told us was that the whole place was Kahanui.

* * * * * [218]

Q. Now going from the seacoast toward Waihanau into the valley, about how far would you ever go, do you recall?

A. Way up to the waterfall there; but there were waterfalls like one would be here (indicating) and one would be again up here (indicating) but we couldn't get up to the other ones. We went down to the first one.

Q. The first waterfall was a long way from the Big Falls point where you went picnicking?

A. Yes.

Q. That's right? A. Yes.

Q. And it was absolutely impassible beyond that first waterfall, wasn't it? A. Very much, yes.

Q. So that was as far as the lepers come?

(Testimony of Christina M. Tuitele.)

A. There used to be an old trail which was there at Makanalua, and the lepers used to go up that trail into the Meyer estate. That's why grandfather put all these kapu signs up.

Q. That first waterfall was several miles toward the sea, or several miles makai of the Big Waterfall that [224] you are talking about, correct?

A. Well, I'll tell you where the waterfalls are. I am taking from Kalaupapa, you see.

Q. Yes.

A. It would be about ten miles, I should think, from where the ocean is. That goes right into that valley. That is Waihanau Valley.

Q. Yes; and about approximately how far from the seacoast to this first waterfall you are talking about? A. I don't know.

Q. Would it be maybe half-way toward the other big waterfall where you used to picnic?

A. Yes, I think it would be more than half-way.

* * * * * [225]

Q. Can you give me any approximation, any estimate of how far that first waterfall is from the seacoast? It doesn't matter if it is accurate.

A. I know, but I cannot say.

Q. You think it was more than five miles?

A. Yes, I think so, because you see that Waihanau Valley, it runs in several miles from up in that fall there way down to the ocean. I wouldn't know how many miles it would be.

Q. All right. Now Mrs. Tuitele, you referred to

(Testimony of Christina M. Tuitele.)

the two ways to get into Kahanui, one through Molokai. A. Yes.

Q. And the other was by a trail? A. Yes.

Q. It was from other Kahanui lands, was it not?

A. Yes.

Q. From Kananui apanas one or two?

A. Yes.

Q. And I believe you said that that trail took you [226] *Waihanau* Falls.

A. Yes. Kahanui. That was the fall. *Waihanau* Falls are down, you see. The whole mountain there, the whole place, grandfather always told us it was called Kahanui. * * * * *

Q. Mrs. Tuitele, at this place where you went picnicking, you saw it was a short distance from a Big Falls, is that correct? [227]

A. I don't know.

Q. In that space, that particular location where you went picnicking, were there three falls in a row, one after another? A. I don't recall.

* * * * * [228]

BERTHA MEYER AUBREY

a witness called by and on behalf of the applicant, being first sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Cass): What relation are you to Mr. Rudolph W. Meyer, Sr.?

A. He is my father.

Q. Who is your mother, Mrs. Aubrey?

(Testimony of Bertha Meyer Aubrey.)

A. My mother is Mrs. Kalima Apanu Meyer.

Q. What was her Hawaiian family name?

A. Kalima Apanu.

Q. Her family? A. Her family is Apanu.

Q. Where did you mother's family come from?

A. Makolelau, Molokai.

Q. Where were you born? [232]

A. Born at Kalae, Kahanui.

Q. That is on the land of Kahanui?

A. Yes. We were all raised on that land. Kalae, Kahanui.

Q. When you were a child did you have Hawaiian servants in your home?

A. Yes, we did. That is all we could have, Hawaiian help. There was nobody around there but Hawaiians.

Q. How long did you live at Kalae?

A. I lived there until I got married.

Q. When were you married?

A. I have forgotten now. In 1907.

Q. In 1907? A. Yes.

Q. How old are you, Mrs. Aubrey?

A. I am now 81 years old.

Q. That would mean that you were born in 1868?

A. Yes.

Q. Now, do you know the land of Kahanui, Apana 3, the land that is on the edge of the Waihanau and Waikolu Valleys? A. Waiakapua.

Q. What does that mean in Hawaiian?

A. The water for the pigs.

(Testimony of Bertha Meyer Aubrey.)

Q. When did you first come to know the land known as the water for the pigs?

A. Well, my father had a lot of cattle in there, a lot of cattle run there, he had hogs, turkeys, and deer, had all those things running on that flat land.

Q. Do you know when he first put cattle and deer on that land?

A. Well, I kind of forget. I know it was a very long time [233] ago.

Q. Was it before you knew of the land?

A. Oh, no. My father had got the land then and put the cattle up there.

Q. He got the land then?

A. Yes. But I cannot tell you the date because father does not always tell us about his business. We were all very small at that time.

Q. Did you go onto this land of Kahanui, mauka, when you were a girl?

A. Yes. We all roamed around there. We gathered shells and we made leis. Very often we went up there. And when my father was living we often went up on a picnic right near the—what you call it now—Waihanau Gulch, at the edge of Waihanau Gulch. That would be often on Sundays that we would go there on picnics and stay there all day, roaming around, even going down into the valley to make leis, gather shells, land shells, and shrimps and all those little things down in the big water hole there.

Q. Did you ever go down to the big water hole?

(Testimony of Bertha Meyer Aubrey.)

A. Yes. Went down on the ieie. That is the only way we could go down.

Q. That is the name of a vine?

A. That is the name of a vine—ieie. Of course, all Hawaiians know that.

Q. It is like a rope, isn't it?

A. Yes, it is like a rope.

Q. You climbed down from the top of the Big Falls?

A. Yes. When we got down there—we had no idea there [234] was such a great big waterfall. That is the only one. We didn't know there was any more higher than that. Only that one we knew. I went down with my brother and mother and sister. I was quite grown up then, about in my twenties. I was over twenty at that time.

* * * * *

Q. Were there any signs or indications along the line of the Big Falls at that time?

A. Do you mean boundary?

Q. Yes.

A. Well, my father always had these redwood posts on the top and there was a stone there too and that is the boundary of the Waihanau—of the Kahanui—of the Waihanau, yes.

Q. Where was this stone located?

A. Right near the redwood pole.

Q. Were they near the edge of the fall or farther back? A. No, up on the top.

Q. Right on the top of the falls?

A. Yes. Right up on the top because we used to

(Testimony of Bertha Meyer Aubrey.)

go up that way to Waiakapua, flat land, up above the Waihanau. That is where we had the cattle running. There was an old trail where we would go up and come back and they used to drive the [235] cattle that way too, up and down that way. I would go with them too because I was just like a tomboy at that time. I would go with my brothers. I had six brothers.

Q. Did you ever go on picnics at this place on the ox cart?

A. You mean where, the flat land?

Q. Yes, or down to the waterfall?

A. We had picnics below the waterfall. That is where we used to go. Father used to go too. And then we would get up on the horse. We had an ox cart to take us up there. There was no wagon of any kind. Only horses. My brothers used to ride and father used to go over to the flat land, where they raised the cattle.

Q. The falls you talk about are those Big Falls that you climbed down on the ieie?

A. Yes. That is the falls I know.

Q. Where is that in relation to Waihanau Valley?

A. That is Holae, Makanalua.

Q. What is Holae in Makanalua?

A. That is the name of the—that is the boundary.

Q. That is the boundary?

A. That is the boundary of Kahanui.

Q. Did you ever talk to any of the old Hawai-

(Testimony of Bertha Meyer Aubrey.)

ians who worked for you about the boundary lines, where your land ran?

A. Well, the old people that I used to know as a child, they used to tell us stories about these lands up there, old lands up there. The people used to stay around those places and tell us about the high hills and big gullies, streams, and waterfalls. That is what they used to tell us when we were small. [236]

Q. These old Hawaiians, were they Molokai folk?

A. Yes, they are Molokai folks; they worked for my father.

Q. From that same area?

A. Yes, near Kalae. They lived about two miles from our place. They had a little hut up near where we got our water from, and they lived there. Quite a few native Hawaiians used to live up there.

Q. That is just above Meyer Lake?

A. Yes.

Q. How many brother did you have?

A. I had six brothers.

Q. Did they all live there on Molokai?

A. Yes, they all lived up there.

Q. Did they all work on the place or did they have jobs somewhere else?

A. No. They all worked on the place until after my father passed away and older brother went over to Kamaleia and he started his own business. He is the only one that left home. You know, he lived on the same place and he came home all the

(Testimony of Bertha Meyer Aubrey.)

time, but he had his own ranch there at Kamaleia, and afterwards he bought a piece of land at Puukoolau.

Q. Were any of those brothers older than you?

A. Younger brother. He died in New York.

Q. One younger brother?

A. Yes. And then I came first and then he is the youngest in the family.

Q. All of them were older than you?

A. Yes, except this younger brother.

Q. Except this younger brother? [237]

A. Yes.

Q. They worked on the place. Did they work on this upper Kahanui, mauka?

A. Yes. Where they put the cattle in there. They built the fence up there for the cattle when my father was living then. The brothers all worked on the land until after my father passed away. They never left home. Only the girls, when they got married. Four sisters or three with myself makes four.

Q. They drove their cattle along the path that passed by the high falls? A. Yes.

Q. That path was there when you first knew the land? A. Oh, yes. When I could remember.

Q. An ancient path?

A. Yes. An ancient path. Very narrow in some places. Very narrow. I couldn't say now but it is quite narrow in some places.

Q. But it is a path that was ancient when you were a girl?

(Testimony of Bertha Meyer Aubrey.)

A. Yes. It went from our home up to Waia-kapua.

Mr. Flynn: Excuse me, please. May I get that path again, where it went?

A. We go up by the lake.

Q. (By Mr. Flynn): By Meyer lake?

A. Yes. And then we go up to Puakoolau and then that little valley and you go down and up on the other side.

* * * * * [238]

Mr. Cass: Your witness, Mr. Flynn. You may cross examine.

Mr. Flynn: If the Court please, I will move to strike all of this testimony insofar as it purports to contain any evidence as to location of the boundary now in question before this Court on the ground that such evidence is inadmissible where the claim of title is by grant including description and map, where the said grant and its map and description have not been shown to be faulty or erroneous.

The Court: The motion to strike on that ground is denied.

Mr. Flynn: Exception, please.

The Court: An exception may be noted.

Mr. Flynn: I will now move to strike on the ground of vagueness and indefiniteness and lack of certainty any testimony sufficient to constitute any evidence of boundary.

The Court: Motion to strike on the grounds mentioned [239] just now will also be denied.

(Testimony of Bertha Meyer Aubrey.)

Mr. Flynn: Note an exception, if the Court please.

The Court: An exception may be noted.

Mr. Flynn: If the Court will excuse me just one moment.

Cross Examination

* * * * *

Q. (By Mr. Flynn): I see. What is included in the lands you have mentioned as Waiakapua; is that of Kahanui?

A. Yes, that is all Kahanui. [240]

Q. It is Waiakapua and the term "Kahanui" refers to exactly the same place? A. Yes.

Q. Plateau?

A. Yes. That is all in Waihanau and Waiakapua is on the up side.

Q. The upper side?

A. Waihanau is along side of the ridge as you go up.

Q. Waihanau is along side of the ridge as you go up? A. Yes.

Q. Do you say Waihanau is included in Kahanui?

A. Yes, that is in Kahanui. Kanalua or Makanalua. That is all in there.

Q. Is any part of Makanalua in Kanalua?

A. All in there. That is wholly Makanalua.

Q. Looking at it the other way, is Kahanui in any part of Makanalua?

A. Kahanui is the name of all the land around Molokai.

(Testimony of Bertha Meyer Aubrey.)

Q. Your Kahanui includes many lands below the mountain lands too, does it not ?

A. Not my father's property. All in where the gulch is, that is all Kahanui. The whole of Waihanau is in my father's property. That is my father's property. He always told us that was his land, our land, and nobody else's. That is what he said.

Q. Do you remember whether your father owned any part of Makanalua?

A. Makanalua is the—Kahanui is in Makanalua—I mean Waihanau. The whole of Waihanau is in Makanalua.

* * * * * [241]

Q. Now, you used to go to the picnic grounds in bull carts, is that right?

A. Yes, when we were all small.

Q. All the way?

A. No. Only go as far as Puukawao because there is a gully that goes down and up and we couldn't go up. But that is all Waihanau. Puukawao is the name of the valley. The cart would only go as far as Puukawao. That is where we would picnic. And all the children wanted to go down in the valley and gather shells.

Q. Did you picnic right at the point Puukawao?

A. Yes, right at the point. That place used to be nothing but ieie.

Q. There are no falls right there, are there?

A. Not where Puukawao go down in the valley. Water running there all the time.

(Testimony of Bertha Meyer Aubrey.)

Q. Down in the valley?

A. Yes, down in the valley.

* * * * *

Redirect Examination

* * * * * [242]

Q. (By Mr. Cass): You said at one time that Waihanau was in Kahanui and at another time you said that Waihanau was wholly in Makanalua.

A. Yes.

Q. Which is right?

A. Well, I think it is in Makanalua.

Q. It is in—— A. It is Makanalua.

Q. It is wholly in Makanalua?

A. Yes, in Makanalua.

Q. Where is the head of that Waihanau Valley that is in Makanalua?

A. I don't remember that.

Q. Where did you father say his title run to in connection with Kahanui?

A. I don't remember.

* * * * * [243]

Mr. Cass: Now I wish to renew my offer as to Mauritz's affidavit; first, on the ground that the statute allows the introduction of affidavits which are on file in any Circuit Court action, and second, on the ground that it is a statement of a disinterested witness who is now dead.

The Court: Any opposition to the offer, Mr. Flynn?

Mr. Flynn: Yes, your Honor. I oppose it on both [244] grounds on which it is offered. As to

the first ground, that the statute authorizes such admissibility, which is the statute or rather Section 9884, Revised Laws of Hawaii 1945, I will submit to the Court that the entire Section 9884 is confined exclusively to the proof or admissibility of documents only insofar as examined copies or authenticated copies may be offered. The statute gives no authority or no determination that any particular document, affidavit or other paper is admissible as evidence in a case. As to the second ground, I will say, and this would somewhat apply as to the first ground too, that the offer in evidence of this affidavit must be rejected because the maker of the affidavit was never subjected to cross-examination, and the admissibility of anything in the nature of statements or testimony is determined by the presence or lack of presence or opportunity for cross examination. The affidavit, as the record in the prior case will show, was refused when an offer was made to put it into evidence in the former case.

* * * * * [245]

The Court: Objection overruled. Exhibit R of the applicant, heretofore offered for identification as R, will be received in evidence as Applicant's Exhibit R.

(The document referred to was received in evidence as Applicant's Exhibit R.)

Mr. Flynn: And my exception may be noted, if the Court please?

The Court: You may have an exception.

Mr. Flynn: And I make an objection on the additional [246] ground that the declarations in the affidavit are those constituting declarations outside of and contradicting the description and map contained in the grant on which claim of title is based, and that the description and map within the grant have not been disapproved or rejected, and that such evidence is therefore inadmissible on that ground.

The Court: The objection also on the grounds just stated is overruled.

Mr. Flynn: May my exception be noted?

The Court: An exception may be noted to that ruling.

Mr. Cass: Now I offer in evidence as an addition to the abstract in this case the deed of Lono Wahine to R. W. Meyer, covering one-half of the Ahupuaa, and a deed by B. P. Bishop to Meyer, covering the other half. They have identical legal positions so I assume that there is an objection to their admission and it can relate to both exhibits.

* * * * *

Mr. Flynn: Both deeds are dated 1883. The correspondence and exhibits now in evidence shows that Mr. R. W. Meyer, the grantee of Kahanui in these deeds, who was also the grantee of the two grants on which claim of title is now based, the claim of title now being based exclusively on the two grants, I submit that these deeds are wholly inadmissible. [247]

Mr. Cass: The law says we must produce all documents which may have a bearing upon this title. These particular deeds should have been in-

cluded by the abstract, at the head of the patent, I believe. The patent is merely a quit-claim. If there are two patents, the oldest patent rules and if the person produces an abstract for the latter patent, then the second patent may be introduced. The same way with this deed. The letter of Meyer, if you will recall, says that "Here is the land which I now occupy, had purchased and thought that I owned." The letter of the minister of the interior says that the records which he examined shows that Meyer does own an equity but that he cannot have a patent. And the basis of giving him the right to buy for \$500 was partly on the basis that he already owned in equity 500 acres of this land and the other 500 acres he wanted to buy. These two deeds are in substantiation of Meyer's first letter that he had bought this land and was in occupancy for some years before the application for the patent. And his claim is that he had a right to believe that he had purchased all this land was more than just simply something out of thin air. It has to do with the title to this land, and as such he always brought in the Land Court abstract, just as we put in the lease agreements and so forth of the Land Commission ahead of the patents.

Mr. Flynn: May I respectfully refer the Court to the amended application now before the Court?

The Court: What portion, Mr. Flynn?

Mr. Flynn: The first page of the amended application, [248] where it says the applicant is the owner, and so forth, of those certain parcels of land described and bounded as follows, and then says,

“Being all of Grant 3437 and Grant 3539, and so forth.” Page 5 shows that this applicant obtained title to said lands from the following, and then recites four deeds, and, No. 5, a decree in equity. There is no claim anywhere in the application that any of the title to the lands now claimed dates back to any transactions prior to the time of the two grants 3437 and 3539.

Mr. Cass: There is no requirement that in the application the party is limited to the original grant. It says that the land is the same as described in the grant, and it is. Our description of the grant is “Apana 3 of Kahanui.” And this is the deed which covers all of Kahanui, regardless of whether more land might have been conveyed than in the patent. At least it covers all that is in the patent because the patent and the papers connected with the patent show it was the grant of an apana of Kahanui. The advertisement of the sale to Meyer describes the land purely as a lele of Kahanui.

* * * * * [249]

The Court: The objection is overruled. The deed dated June 28, 1883, will become Applicant's Exhibit S in evidence, and the deed dated October 25, 1883, will become Applicant's Exhibit T in evidence.

Mr. Flynn: May my exception be noted?

The Court: Exceptions may be noted.

(The documents referred to were received in evidence as Applicant's Exhibits S and T.)

* * * * * [250]

ERNEST DONALD MEYER

a witness called by and on behalf of the applicant, being first sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Cass): What is your relationship to Rudolph W. Meyer, Senior?

A. He was my grandfather.

Q. Where were you born?

A. I was born at Kalae, Molokai, on the land of Kahanui.

Q. How old are you?

A. I am 58 years old.

Q. How long did you live on the land of Kahanui? A. All my life.

Q. Are you familiar with the land known as Mauka-Kona, Kahanui? A. That is Apana 3.

Q. Of Kahanui? A. Yes.

Q. How long have you been familiar with that land?

A. Oh, since I was about 10 years old, when I used to ride a horse to go with my father and my uncles.

Q. Do you know the boundaries of Kahanui?

A. Yes, I know the boundaries of Kahanui.

Q. How did the boundaries of Kahanui become known to you?

A. From my father and my uncles, they used to tell me "This is our land; our boundaries run——"

(Testimony of Ernest Donald Meyer.)

The Court: Mr. Meyer, you will have to speak a little [252] louder, please.

Q. (By Mr. Cass): Your father's name was what? A. Henry R. Meyer.

Q. When was Henry R. Meyer born?

A. That I do not know. I never kept a record of it.

Q. What was his number in the sons of Rudolph W. Meyer; was he No. 1, No. 2, in age, or how? A. He was No. 3 in age.

Q. No. 3 in age. How old was he as compared to your uncle Otto? A. That I don't know.

Q. Now, referring specially to the boundary of Kahanui 3 that runs across the upper end of Makanalua Leper Settlement. Do you know where that boundary runs?

Mr. Flynn: If the Court please, may I interrupt and make my objection to the giving of any of this testimony. It is parol evidence, evidence by reputation. My objection is that such is not admissible unless and until the expressed description in the grant or grants, including the map or maps, has been refuted or found to be in error.

The Court: The objection on that ground is overruled.

Mr. Flynn: May I object further that the witness cannot give testimony in the nature of ka-maaina testimony on land boundaries, not being qualified.

The Court: That objection is also overruled.

Mr. Flynn: An exception noted to each ruling?

(Testimony of Ernest Donald Meyer.)

The Court: An exception may be noted as to each ruling.

Mr. Cass: Will you read the question, please, Mr. Reporter? [253]

(The question was read by the reporter.)

A. Above the high waterfall; above the waterfall.

Mr. Flynn: What was the last part of the answer? A. Above the waterfall.

Q. (By Mr. Cass): When you say "Above the waterfall," where do you mean above the waterfall, some distance back or otherwise?

A. No. The highest waterfall.

Q. Is it at the highest waterfall? A. Yes.

Q. Do you know the name that we have been applying to this high waterfall?

A. Some of the old people used to tell me it was Kaulahuki, was the name of the high waterfall. [254]

* * * * *

Q. (By Mr. Cass): Now, as to the far side of the land, that is the land beyond the stream as you enter this land, is that straight up and down or is it a gradual slope?

A. Straight up and down.

Q. I mean the place where the path goes?

A. Oh, it is a gradual slope.

Q. It is a gradual slope? A. Yes. [255]

* * * * *

The Court: Cross examine.

Mr. Flynn: If the Court please, I will move

(Testimony of Ernest Donald Meyer.)

first to strike all of the testimony for vagueness and uncertainty, insufficiency in itself, to have any bearing on location of the boundaries between Kahanui and Makanalua.

The Court: The objection is overruled. An exception may be noted.

Mr. Flynn: Thank you.

* * * * *

Q. (By Mr. Cass): Do you know where the lands of Waihanau lie?

A. Below the waterfall.

* * * * *

Cross Examination

Q. (By Mr. Flynn): Mr. Meyer, you have referred to a high waterfall? A. Yes.

Q. At the point you were talking about, is there just one fall there?

A. Just two; one smaller than the high one. [257]

Q. There are just two falls, is that correct?

A. Yes.

Q. About how close are they to each other?

A. Oh, I think about, a rough guess, about 200 feet.

Q. About 200 feet apart, approximately?

A. Yes.

Q. Now, as you approached those falls from the upper lands of Kahanui and going towards Kalaupapa, which is the larger of those two falls?

A. The second one is the largest.

Q. The second one? A. Yes.

(Testimony of Ernest Donald Meyer.)

Q. Were you ever down below the first fall and the head of the second fall?

A. Yes, I was down there.

* * * * *

Q. You say these waterfalls were known as Kaulahuki? A. Yes.

Q. Was the first or the second fall called Kaulahuki? [258] A. The second fall.

Q. The second fall as you go down the valley?

A. Yes.

Q. Have you ever heard of the term "Kaulahuki" as referring to a mountain peak?

A. No, I haven't heard.

Q. So you say that Kaulahuki as told to you by the oldtimers was the second fall? A. Yes.

Q. It is the larger of the two falls?

A. Yes.

Q. Was there a third fall near either of the other two falls?

A. No, not that I know of. [259]

* * * * *

Q. What is the boundary or boundaries on the north?

A. The edge of the valley is the boundary on the north.

Q. Which valley? A. Waihanau Valley.

Q. Waihanau Valley? A. Yes.

Q. Is there any other valley bounding any other part of Kahanui? A. No.

Q. Did you ever hear of Waikolu Valley?

A. Yes, I heard about it, yes.

(Testimony of Ernest Donald Meyer.)

Q. Do you know where it is?

A. On the north, I guess. I am not sure.

Q. Do you know whether any of the mauka Kahanui lands went as far as Waikolu Valley?

A. Along the edge of Waikolu Valley.

Q. Along the edge of Waikolu Valley?

A. Yes.

Q. That is one of the boundaries then, isn't it?

A. Yes.

* * * * *

Q. You have said that the large falls has the name Kaulahuki?

A. Yes. That is the name of the falls. That is only the [262] fall.

* * * * *

Q. As you come up along that journey I am speaking of mauka from the Big Falls, towards the other land upstream, what is the general formation of the lands?

A. Well, they have a stream and pools and small gulches.

Q. Small gulches? A. Yes.

Q. As you walk mauka, what is there on your right? A. Just the side of the gulch.

Q. The side of the gulch? A. Yes.

Q. Does the side of the gulch go up very high?

A. Oh, it is passable; you can go in and out.

Q. I beg your pardon?

A. It is passable. You can go in and out of those gulches. Not so high.

(Testimony of Ernest Donald Meyer.)

Q. On your left as you walk mauka, what is the general formation of the land?

A. The side of the gulch too?

Q. The side of the gulch. A. Yes.

Q. Can you climb it?

A. Yes, you can. [263]

* * * * *

PENN HENRY MEYER

a witness called by and on behalf of the applicant, being first sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Cass): Where were you born?

A. At Kalae, Molokai.

Q. What relation are you to Rudolph W. Meyer, Senior? A. Grandson.

Q. Who was your father? A. Otto Meyer.

Q. In the sequence of sons, where does Otto Meyer come in? Is he the oldest or the youngest or in between, of the sons of Rudolph W. Meyer?

A. He is the second oldest, I think.

Q. The second oldest. Do you know about when he was born? [268]

* * * * *

Mr. Flynn: Born about 1858.

* * * * *

Q. Were there any cowboys or other employees of Rudolph W. Meyer that went with you in the operation of this land?

A. They did, but they are all dead now.

(Testimony of Penn Henry Meyer.)

Q. They are all dead now. Did you ever learn from them or from your father the location of the boundaries of the Meyer land?

A. My father and my uncles always told me about the boundaries of the Kahanui land.

Q. Are any of your uncles still alive?

A. None of them.

Mr. Flynn: If the Court please, may I interpose my objection to this testimony? General reputation or information received from the father and uncles, first, as hearsay, and secondly, as being inadmissible where the title to the land is claimed by grant containing descriptions and maps, and parol evidence of any nature is inadmissible unless and until the description and the maps and grant or deeds are refuted [269] or found to be ambiguous.

The Court: Objection overruled. An exception may be noted. * * * * *

Q. (By Mr. Cass): Now, do you know where the land of Waihanau lies?

A. The land of Waihanau lies, according to my father, he said it was below the Big Falls.

Q. Do you know if any name was given to the Big Falls by your father or these older Hawaiians?

A. I used to hear some of the Hawaiians say it used to be Kaulahuki.

* * * * *

Cross Examination

Q. (By Mr. Flynn): Mr. Meyer, what is your own age?

A. I am 47. [270]

* * * * *

(Testimony of Penn Henry Meyer.)

Q. Now, you have heard of the name of the Big Falls as Kaulahuki; have you heard of any name of the stream above the Big Falls as you go mauka?

A. Above the Big Falls, my father used to call it all Kahanui, the whole valley right up to the mountain.

Q. That is the name of the whole area? [271]

A. That is right.

Q. All the lands above. Have you heard of any name for the stream alone? A. No.

* * * * *

Q. Have you ever traveled from the Big Falls and along the stream mauka to the upper lands?

A. You mean up the valley?

Q. Yes. A. Yes, I did.

Q. From the Big Falls, all the way up?

A. Above the Big Falls?

Q. Above the Big Falls, going mauka?

A. That is right.

Q. And you have traveled along the stream as you have gone up?

A. Once in a while up the stream; most of the time we crossed over to the other side of the ridge there, they call it Waialeia, the lower end of Kahanui. [272]

* * * * *

Q. Were cattle, if you know, ever on this upper ridge along Waialeia?

A. They used to come down the valley there from upper Kahanui to a place they used to call

(Testimony of Penn Henry Meyer.)

Waiakapua, they used to come right down the valley along the ridge.

Q. Were they ever on that upper ridge there?

A. Yes, they were sometimes.

Q. They were? [273] A. Yes.

Q. You say cattle would come along the valley?

A. There is a ridge there and they came right down that ridge into the valley. There used to be a trail there. Always a good trail to travel.

Q. You say that was from Waiakapua?

A. That is right.

Q. And Waiakapua included how much of the Kahanui lands?

A. That is the biggest area up there. I don't know. About a thousand acres or more.

Q. Will you say Waiakapua included about all of the mauka Kahanui lands?

A. That is the top end of Kahanui.

Q. Do you know the boundaries of mauka Kahanui by the term Apana 3, or does that mean anything to you? A. No, I don't.

Q. That doesn't mean anything to you. All right. Now, you refer to a boundary on the north, on the Leper Settlement side, as Kaulahuki or the Big Falls? A. That is right.

Q. Does that boundary join any other lands owned by Meyer or owned by the Meyer Corporation, if you know?

A. No. Just Kahanui. They call the whole place Kahanui. That is all.

(Testimony of Penn Henry Meyer.)

Q. Kahanui is the name also of a large area of lower lands, isn't it? [274]

* * * * *

A. It is divided. There is a forest boundary running between lower Kahanui and upper Kahanui.

Q. There is a forest there?

A. And there is a trail going through.

* * * * *

Q. Do you know the name of the locality at that point where the trail begins?

A. The name, they used to call that name Kaohu. There is a trig station there. [275]

* * * * *

Q. Did I understand you to say that you take the trail from approximately Kaohu to the upper or mauka Kahanui lands and through the forest reserve area?

A. That is right.

Q. Can you estimate the distance from the beginning of that trail to the point where you reach the upper Kahanui lands, just an estimate?

A. I think it runs about three quarters of a mile or one mile. Somewhere around there.

Q. About three quarters of a mile or one mile?

A. Yes.

Q. That is to the beginning of Kahanui?

A. Yes.

Q. Now, when you arrive at the beginning of the mauka Kahanui lands, is there any marker or point or land marker to tell you where the beginning is?

(Testimony of Penn Henry Meyer.)

A. Yes, there is a cross on a stone there.

* * * * *

Q. Have you ever been over the lands with any survey groups? A. Yes, I did.

Q. When did you do that, and at what times, if more than [276] once?

A. Just once I have and that was 1947.

Q. In 1947? A. Yes.

Q. Whom were you with at that time?

A. Mr. McKeague. [277]

* * * * *

Q. Now, getting back to the survey parties again, do you recall ever hearing whether a Mr. Fred Harvey made a survey of the lands in the general area of that makai boundary of Kahanui?

A. Yes, I heard about it. [280]

* * * * *

Q. Can you state just approximately how long ago it was?

A. I think within 15 years or more, I think.

Q. Fifteen years or more ago? A. Yes.

Q. But you had nothing to do with his survey party? A. No, I did not go out.

* * * * *

Q. Do you recall when the Hawaiian Homes Commission put a tunnel in that general area?

A. You mean what year it was?

Q. Or approximately what year, yes.

A. I think they started in 1924 and completed it in 1925, if I am not mistaken. [281]

* * * * *

(Testimony of Penn Henry Meyer.)

Q. Were you ever on the lands in the vicinity of that tunnel during the time it was being constructed? A. I did.

Q. You were there?

A. Well, I used to go hunting all the time. We used to pass above the tunnel work.

Q. You used to go hunting and would pass above where they were putting the tunnel in?

A. Yes. The old trail going down the ridge and up the other side.

Q. What about that old trail going down the ridge and up the other side?

A. That is going up to Waialeia Valley, going down that valley, Waialeia Valley.

Q. You would go through there on a hunting trip? A. Yes.

Q. Down that trail and up to the ridge on the Waialeia side, is that correct? A. Yes.

Q. And this was above or beyond or mauka of where they were putting in the tunnel?

A. Right above.

Q. Right above? A. Right above.

Q. By "right above," will you estimate how far?

A. Going down the valley it is about, I would say, about [282] 100 feet away, but going up the other side it is right opposite the tunnel.

* * * * *

Q. As best you can remember, what was the nearest waterfall to the point where you crossed the stream on the old trail?

(Testimony of Penn Henry Meyer.)

A. There is no waterfall right by the old stream, I mean by the old trail.

Q. No waterfall by there? A. No. [283]

Q. Was there any waterfall mauka or above the old trail?

A. They don't call it a fall. There is a pool there.

Q. There was a pool mauka of the old trail?

A. Yes.

Q. About how far mauka, can you recall?

A. Well, I should say about a thousand feet maybe, more or less. I am not sure. [284]

* * * * *

Q. Did you go up as far as that pool that you have referred to, which was approximately a thousand feet mauka of the old trail?

A. We crossed on top there. [285]

* * * * *

Q. As you walked along the stream, Mr. Meyer, in this same mauka direction from the Big Falls on upward to the larger area of the flat lands, do not the ridges coming from the sides, that is, coming from the top of the level lands up above, down to the stream, do any of those ridges come right to the stream bed or are they set back for quite a distance?

A. I think there is one a way up that comes right down to the bed. The valley is split, see?

Q. The valley is split there?

A. Yes. * * * * * [286]

Q. I am speaking of the ridge you have referred

(Testimony of Penn Henry Meyer.)

to as one that comes right down to the stream bed. Can you recall where that ridge comes from, whether the Waialeia side or the——

A. (Interrupting) It comes from Waiakapua, a way above Waialeia.

Q. Above Waialeia?

A. Up the valley, the Kahanui Valley, runs way up; it is about two or three thousand feet above the pool there.

Q. Two or three thousand feet above the pool?

A. Or maybe more, I don't know.

Q. You have referred to the pool approximately a thousand feet mauka of the point where the old trail crosses the stream. A. That is right.

Q. Does that pool or did that pool ever have a name? A. Yes. Waiau pool.

Q. That was Waiau pool? A. Yes.

Q. I believe you said there was no waterfall around that pool?

A. Just a little drop; I cannot say it is a waterfall.

Q. Just a little drop? A. Yes.

Q. Is the little drop right into the pool or is it above or below?

A. It falls into the pool. * * * * * [287]

Q. Do you recall, Mr. Meyer, aside from Harvey's surveying party, whether any other surveying parties were in or around these lands, specifically the makai boundary, in the twenties or early thirties?

(Testimony of Penn Henry Meyer.)

A. Just Jorgenson and Wright, Harvey and Wright. * * * * * [291]

Q. You have referred to the area along the stream above or [292] mauka of the point you call Kaulahuki as the valley, haven't you?

A. Yes.

Q. Do you know whether that valley or any part of that valley has a name?

A. Yes. They used to call it Kahanui Valley.

Q. They used to call it Kahanui Valley. Can you give us an estimate or approximation as to how far up that Kahanui Valley runs or to what point on the land can you refer as the end or ends of that Kahanui Valley?

A. It runs almost clean up to the top.

Q. Almost clear up to the top? A. Yes.

Q. Almost as far up as where the old mountain home used to be?

A. Passed the mountain home.

Q. Even past that? A. Yes.

Q. Now, as you are on the top land or flat land above the old trail, on the Kalamaula side, and you look down into the stream there, can you see the stream from the top of the pali?

A. All along the ridge you can, yes.

Q. Along the ridge you can. I am speaking of the ridge on the Kalamaula side, on the right-hand side as you go mauka? A. That is right.

Q. Okay. Can you estimate the distance or elevation from the top of that ridge to the stream bed?

(Testimony of Penn Henry Meyer.)

A. I will say it is 500 feet or more.

Q. Five hundred feet or more. And to the ridge across the valley there, where the trail goes up to what we will call [293] the Waialeia Ridge of Kahanui, can you estimate the elevation there from the bed of the stream to the top of the pali?

A. Not less than 500 feet.

Q. It is approximately the same on both sides?

A. Almost the same. [294]

* * * * *

Q. This cross on the stone is on the top of the pali, isn't it? A. That is right.

Q. As you follow along on the top of the pali, as you walk along there, going mauka, is there any flat land to your right?

A. On the Kalamaula side?

Q. Yes.

A. Yes, there is flat land there, right to the cliff.

Q. I beg your pardon?

A. Right to the cliff. Right to the pali there.

Q. Right to the pali? A. Yes.

Q. Do you know whether any of that flat land belongs to Kahanui or is it all Kalamaula? [295]

A. I don't know about the boundaries there.

Q. Do you know whether any part of that flat land is in Kahanui?

A. There might be a narrow strip, but I don't know.

Q. As far as you recall, there were no cattle up along that strip, is that correct?

(Testimony of Penn Henry Meyer.)

A. No. They used to drive them back and forth sometime. That is, from the upper part they used to drive the cattle. That is the passage through there.

Q. That is the pass through there. You would drive them between the upper part and Kaohu, do you mean?

A. Yes.

* * * * *

Q. Was there any stretch of lands on which cattle could be grazed between those points or did you at all times follow this narrow strip all the way down to Kaohu?

A. No, they never used to leave any cattle there.

* * * * * [296]

Q. (By Mr. Flynn): Mr. Meyer, I was just asking you about cattle that you would take, going mauka from approximately the cross on the stone towards the flat lands up mauka. Those were only stray cattle?

A. Whatever broke loose, we would bring them down that way before. * * * * * [297]

Q. Yes. I am trying to get placed in my own recollection of these lands where the cattle would be from that strayed onto this little area around the cross on the stone.

A. That is from upper Kahanui.

Q. From upper Kahanui?

A. Yes.

Q. I see.

A. They never used to graze around there though. When we used to drive cattle some of them used to break away from up above and hide in the

(Testimony of Penn Henry Meyer.)

forest and we would generally go back the next day and hunt them out and bring them down to where the cross is and pass through that path there.

Q. Are you referring there to the point or rather to upper Kahanui as the Waialeia side or as to the large flat lands in [298] Waiakapua?

A. The whole area that the cattle used to roam. Waialeia and Waiakapua.

Q. So they might be from either place?

A. Every time when we drove cattle we used to drive them all up and come around the other way, along the road there.

Q. Where did the road run?

A. The road is on the right of where the old forest mountain house used to be.

* * * * *

Q. Was there another roadway makai of that?

A. Just a trail.

Q. Just a trail? A. Yes.

Q. Was that the trail that came from Kaohu over to the point known as cross on stone?

A. There are two trails, one on the upper and one on the—they split there, two trails, one goes to Kaohu and one comes down to the Kalamaula side. [299]

Q. Kalamaula side, there is a trail too?

A. That is the trail they generally drove the cattle on.

Q. Was there ever any occasion to take cattle from the trail beginning at Kaohu and go over to the cross on stone and then go to the upper lands?

(Testimony of Penn Henry Meyer.)

A. Often take them back to the upper lands.

Q. Either way, either up or down on that trail?

A. Not that I know of; only the stray ones.

* * * * *

Q. Beginning from the cross on the stone, did you follow along the top of the pali?

A. That is right.

Q. And did that trail go beyond the top of the pali? I mean go along the top of the pali beyond the old trail that led down to the stream bed?

A. It follows the edge of the valley all the way up to the mountain house.

Q. And you went beyond the point that was the old trail going down to the stream bed? [300]

A. Yes.

Q. You went beyond that point?

A. Just keep on going straight up, yes.

Q. Did it go past the point we referred to as Waiau?

A. Yes, way past that.

Q. Was there any point where you could go down any of the ridges to Waiau as you followed along the top of the pali?

A. Do you mean to take cattle down or something?

Q. First, to take cattle down, yes.

A. Not during my time; not that I know of.

Q. Was there any point where you could go down to Waiau yourself, just persons?

A. Oh, yes, you could go up and down.

Q. You could go up and down?

A. Three or four or five places.

(Testimony of Penn Henry Meyer.)

Q. Were there three or four or five places you could go down from the top of the pali and across the stream and up to the other side of the Waialeia side? A. That is right.

Q. Three or four or five places?

A. When we would go hunting we would cross any where we wanted. [301]

* * * * *

Mr. Cass: I have nothing further, if the Court please. I have to present one more exhibit, which is in the course of preparation, and that consists of the notation of the contents of a file in the Archives concerning the construction of a water pipe at Kalaupapa, the dates when it was started and the dates when it was finished, and the course of the pipe line. I will present that as soon as it is finished, subject to any objection the defendants may have.

The Court: Otherwise, you are through?

Mr. Cass: Otherwise, I am through.

The Court: You will be permitted to reopen for that limited purpose. Are all your exhibits properly in, all those marked for identification, either in or rejected? Did you check your list? [305]

Mr. Cass: I don't believe I have any in for identification.

The Clerk: Nothing; just the affidavit that was received. That was the only one for identification.

The Court: Very well. Is the Government ready to proceed?

Mr. Flynn: First, if the Court please, I wish to make a motion to the Court to enter an order denying the application for registration on the ground, first, that it is supported by inaccurate and insufficient description and map, for the reason that it erroneously shows the lands to consist of Grant 3437 and Grant 3539 on a portion of Grant 3437, this being shown both in the map and in the descriptions in the application, and the same are patently defective by the unambiguous language of the grants themselves and by the unambiguous re-statements contained in the correspondence between the minister of the interior Thurston and the original grantee R. W. Meyer.

The Court: Do you have more than one ground?

Mr. Flynn: Yes, your Honor.

The Court: Perhaps you can recite all the grounds you have for the record and then we can take them up for argument one by one.

Mr. Flynn: Yes.

The second ground is that the claim of title is based upon two grants, both containing descriptions and maps, and the descriptions and maps to have been shown to be either defective or ambiguous; that evidence or testimony showing other or additional lands to have been within the intentions [306] of the parties is therefore inadmissible, and that the said maps and descriptions filed with the application are contrary to and contradictory with maps and descriptions in the two grants upon which claim of title is made for the application.

Those will be my only two grounds, your Honor.

* * * * *

The Court: The motion, upon both grounds, as stated, is denied.

Mr. Flynn: I note an exception, please.

The Court: An exception may be noted for the record. [307]

* * * * *

Mr. Flynn: I have discussed with counsel for the applicant numerous exhibits we expect to offer and we have arrived at an agreement as to a portion of them, which I will start with now and the others will be brought in as the testimony proceeds.

The first is a letter from M. D. Monsarrat to Professor W. D. Alexander, Honolulu, dated May 27, 1885, at Kaunakakai.

Mr. Cass: I have seen it.

The Court: Any objection? [308]

* * * * *

Mr. Cass: I have no objection to it. Your Honor, the only comment I have on it is that it refers to the boundary of Kahanui, and it is agreed between the parties that the portion of Kahanui referred to in that letter is not the portion under application at the present time.

Mr. Flynn: I so stipulate, your Honor. I might state that this particular exhibit is introductory in nature at the most to the work of M. D. Monsarrat, but I would ask leave of Court to read it into the record.

The Court: Received in evidence as Territory's Exhibit 6.

(The document referred to was received in evidence as Territory's Exhibit No. 6.)

* * * * *

Mr. Flynn: The next offer is a packet of three letters, all from M. D. Monsarrat to Professor W. D. Alexander, the first dated at Kaunakakai, July 17, 1885, the second dated at Kaunakakai July 31, 1885, the third dated at Pukoo February 7, 1889.

Mr. Cass: If the Court please, these are the same photostats that have been heretofore used in litigation between the parties. There is perhaps some underlining in [309] the photostats to which we do not object.

The Court: Let the record so show. It will become Territory's Exhibit 7-A, letter of July 17, 1885, Territory's Exhibit 7-B, the letter of July 31, 1885, and Territory's Exhibit 7-C, the letter of February 7, 1889.

(The documents referred to were received in evidence as Territory's Exhibits 7-A, 7-B, and 7-C.)

* * * * *

Mr. Flynn: I next offer a certified photostatic copy of description of Grant 3539 to R. W. Meyer, made from the original papers of Grant 3539 on file in the office of the commissioner of public lands, Territorial Office Building, Honolulu.

Mr. Cass: I think that is the same as the one I offered. I have no objection to it going in.

The Court: It will become Territory's Exhibit 8 in evidence.

(The document referred to was received in evidence as Territory's Exhibit 8.)

Mr. Flynn: As the last non-controversial exhibit, I will offer a certified photostatic reproduction of the description of the boundaries of the ahupuaa of land called Makanalua. [310] That is certified before L. M. Whitehouse, Surveyor, Territory of Hawaii, on the 28th day of September, 1936.

Mr. Cass: No objection.

The Court: It will become Territory's Exhibit 9 in evidence.

(The document referred to was received in evidence as Territory's Exhibit No. 9.)

Mr. Cass: May I ask what the date of the survey note was, that it shows?

The Clerk: April 8, 1945.

Mr. Flynn: If counsel has no objection, I will state that the correct date is 1865. It would appear as 1845. It actually isn't even 1845 either. It is that the writing is indistinct and the correct date is 1865. If counsel wishes to challenge it, we will verify it.

Mr. Cass: I don't challenge it. I believe it was 1865.

* * * * *

H. E. NEWTON

a witness called by and on behalf of the Territory, being first sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Flynn): Will you state your full name? A. H. E. Newton.

Q. Your occupation, Mr. Newton?

A. Senior cadastral engineer, Territorial Survey Department.

Q. Are you a registered surveyor, Mr. Newton? [311] A. I am.

Mr. Cass: I will stipulate that he is qualified as a surveyor.

Mr. Flynn: Stipulate that he was qualified as a surveyor and has been so——

Mr. Cass: For a long time, yes.

Mr. Flynn: Approximately 30 years.

Mr. Cass: I will so stipulate if he will so state.

Mr. Flynn: And qualified to act and appear as a surveyor for the Land Court of Hawaii for approximately 25 years.

Mr. Cass: Yes.

Q. (By Mr. Flynn): How long have you been with the Territorial Survey Department?

A. I started in 1900.

Q. And have you been with that department continuously since 1900? A. Yes.

Q. Did you know M. D. Monsarrat in his lifetime? A. Very well.

Q. Did you know J. F. Brown or Mr. Jake Brown in his lifetime?

(Testimony of H. E. Newton.)

A. Yes, I knew Mr. Brown also.

Q. In the course of your work as a surveyor for the Territorial Survey Department, have you had occasion to make surveys of land boundaries within the Hawaiian Islands? A. Yes.

Q. Have you also had occasion to examine older existing surveys of land boundaries within the Hawaiian Islands? A. I have. [312]

Q. Have you had occasion to check any records within the Territorial Survey Department of surveys performed by M. D. Monsarrat?

A. Yes, many times.

Q. Many times. Have you had occasion to check or examine maps in the Territorial Survey Department made by M. D. Monsarrat? A. Yes, sir.

Q. Have you used the information or data on such maps for any boundary surveying work that you have done yourself? A. Yes.

Q. You stated that you were familiar with the work of M. D. Monsarrat. From your familiarity, can you state whether he obtained the assistance or help of kamaainas in his surveying?

A. Yes. He did the original surveying for these ahupuaas to open up the government lands and adjoining private lands and he had kamaainas to guide him through.

Q. He used them frequently or consistently, could you state?

A. Oh, yes, consistently. He surveyed practically the whole island of Molokai. [313]

* * * * *

(Testimony of H. E. Newton.)

Q. (By Mr. Flynn): Mr. Newton, do you recall the time or approximately the time of the death of Mr. Monsarrat?

A. I don't remember the date.

* * * * *

Q. Now, Mr. Newton, are you familiar with the lands known as Kahanui, Apana 3, on the island of Molokai? A. Yes.

Q. Have you ever surveyed those lands or any portion of those lands?

A. I surveyed portions of the lands.

Q. Roughly or approximately what portions did you survey?

A. I surveyed the makai section, the lower section adjoining the Leper Settlement and the boundary between Kalamaula and Kahanui boundary—I mean the boundary between the two lands, Makana-lua and Kahanui. Not all the way through but about three or four courses mauka.

Q. Did you examine any older or existing surveys of those lands in the course of your own surveying work around those [315] boundaries?

A. I did.

Q. What existing or older surveys did you examine?

A. The Kalamaula survey. In fact, that is all that adjoins this particular piece of land. And Kaunakakai on one side. That is right. Kaunakakai and Kalamaula.

Q. Did you find and examine any surveys of Kahanui, Apana 3, itself?

(Testimony of H. E. Newton.)

A. There was a survey made by Monsarrat of that piece of land.

Mr. Cass: Objected to; that is not responsive.

Mr. Flynn: I asked him if he found or examined any survey of Kahanui, Apana 3, itself.

The Court: Objection overruled.

A. What I examined was a survey made by Monsarrat of Apana 3.

Q. Of Kahanui? A. Of Kahanui.

Q. Did you find any record of a description by Monsarrat of his survey of Apana 3 of Kahanui?

A. Yes. [316]

* * * * *

Q. (By Mr. Flynn): Mr. Newton, where did you find a survey or record of a survey by Monsarrat of Kahanui, Apana 3?

A. We have a copy of the survey right in the survey office.

Q. Right in the Territorial Survey Office?

A. Yes.

Q. Did you check that particular survey, examine it or use it in any way, when making your own survey that you have spoken of as a portion or the northern boundary portion of Kahanui, Apana 3?

A. Yes, I used Monsarrat's survey.

Q. Did you arrive at a conclusion of your own as to the northern or any portion of the northern boundaries of Kahanui, Apana 3? [317]

* * * * *

(The question was read by the reporter.)

(Testimony of H. E. Newton.)

Q. (By Mr. Flynn): My question, Mr. Newton, was this: Did you arrive at a conclusion of your own?

A. My conclusion is based on interpreting the survey made by Monsarrat.

Q. You did arrive at a conclusion based on interpreting Monsarrat's survey? A. Yes.

Q. Did you prepare a map?

A. I did, of a portion, not of the whole Kahanui itself, just the lower portion and along the boundary of Makanalua.

Q. Is this map you prepared based on the surveying work that you did and confined generally to the area in which you did do surveying work?

A. Yes.

Q. Was your principal activity in conducting this survey retracing of the survey by M. D. Monsarrat? A. Yes. [320]

Q. Did you use any maps made by M. D. Monsarrat?

A. I used several maps that are filed in the survey office.

Q. Made by M. D. Monsarrat?

A. Made by M. D. Monsarrat.

* * * * *

Q. Mr. Newton, have you seen either the original grant or a photostat copy of the original Grant No. 3437 to R. W. Meyer? A. Yes, I have.

Q. Bearing date October 29, 1889, covering lands at Kahanui? Showing you Exhibit B of the applicant, I will ask you if you have seen that before?

(Testimony of H. E. Newton.)

A. Yes, I have seen this before.

Q. Do you recall referring to that grant and its language? A. Yes.

Q. At or about the time you did your own surveying work?

A. Yes, I used this as a guide or aid in my surveying work, Mr. Flynn. [321]

* * * * *

Q. (By Mr. Flynn): Mr. Newton, I show you a large map entitled "Map showing portions of boundaries of lands of Kahanui, Makanalua, and Kalamaula, Island of Molokai; scale: 1 inch equals 200 feet. Survey and map by H. E. Newton, September 1936," and ask you if you are the author and creator of this map?

A. I am.

Q. You have previously stated you did surveying work on the question of the northern boundaries of Kahanui and you referred to Makanalua and Kalamaula. Does this map reflect the survey work you have previously referred to?

A. Yes, it reflects my opinion of the boundary, the northern boundary of Grant 3437. [322]

* * * * *

(The document referred to was received in evidence as Territory's Exhibit No. 10.)

* * * * *

Q. (By Mr. Flynn): Mr. Newton, I will show you a large map bearing the following identification: "Hawaiian Government Survey, W. D. Alexander, Supt. Molokai. Middle and west section. Map

(Testimony of H. E. Newton.)

and survey by M. D. Monsarrat. Scale: 1/12000 or 1,000 feet equals 1 inch. 1886 worksheet," and bearing below in blue stamp "M. D. Monsarrat, Surveyor, dated Honolulu, September 1886, H Islands," and ask you whether you have seen this map before?

A. I have.

Q. Did you examine or check or use this map in any way in doing the survey work you have spoken of on the northern boundary of Kahanui?

A. Yes, I have.

Q. Is this a registered map of the survey department of the Territory of Hawaii?

A. It is.

Q. Bearing register No. 1259?

A. Yes. [324]

* * * * *

(The document referred to was received in evidence as Territory's Exhibit No. 11.)

* * * * *

Q. (By Mr. Flynn): Mr. Newton, I show you this large map entitled "Hawaiian Government Survey, W. D. Alexander, Supt., Molokai, middle section, map and survey by M. D. Monsarrat, scale: 1/12000 or 1,000 feet equals 1 inch, 1886, registered map 1260," and ask you if you have seen this map before? A. I have.

Q. Did you examine or use this map in any way in your own survey work as to the northern boundary of Kahanui, Apana 3?

A. Yes. I used this map as a guide in determining the north boundary of Grant 3437.

(Testimony of H. E. Newton.)

Q. Is this an official map, an official registered map in the records of the survey department of the Hawaiian Government? A. It is.

Mr. Flynn: I similarly offer this map, being registered [326] map 1260, in evidence.

Mr. Cass: We object. The face of the map itself shows it was not in existence at the time the grant was issued; that the map contains data of the grant of 1889 that couldn't possibly have been on this map in 1886 or 1888, when this grant was issued, and there is no way that he can tell or that anyone else can tell what data was on that map in 1888, when the grant was issued, except that we know that the map itself was not completed at the time of the grant, and it has no evidentiary value on the boundary as established by the grant itself.

Mr. Flynn: All of which, if the Court please, goes to the weight and reliability of the map and has nothing to do with its admissibility in evidence at this point.

Mr. Cass: We are trying to establish the boundaries of this land as it existed in 1888. That is the point of the grant that is before the Court. Maps which are in existence in the survey office and on their face show that they are not of the date that they purport to be, of 1886, but are compiled at some later date—I haven't examined the map carefully, but I think if you will look at it you will find there are notations up there up to 1900, and there is no way in the world anyone can tell about

(Testimony of H. E. Newton.)

that map, when it was compiled. Certainly it was never compiled in 1886.

The Court: As to those matters the applicant may examine the witness on cross examination. But as to its admissibility, the objection is overruled. Registered Map 1260 will be Territory's Exhibit 12 in evidence. [327]

* * * * *

(The document referred to was received in evidence as Territory's Exhibit No. 12.)

Q. (By Mr. Flynn): Mr. Newton, I show you this large map, bearing identification "Hawaiian Government Survey, Molokai, middle and west sections, M. D. Monsarrat, Surveyor; scale: 2,000 feet equals 1 inch;" and a worksheet likewise bearing stamp "M. D. Monsarrat, Surveyor, Honolulu, September 20, 1886, H. I." I will ask you whether you have seen this map before?

A. Yes, I have seen this map before.

Q. Did you examine or check or use this map in any way in performing the survey work as to the northern boundaries of Kahanui, Apana 3, to which you previously testified?

A. Yes, I consulted this map also.

Q. And is this a registered map, is this an official registered map in the records of the survey department of the Territory of Hawaii?

A. It is.

Mr. Flynn: I will offer this map in evidence.

Mr. Cass: What is the register number?

(Testimony of H. E. Newton.)

The Court: 1289.

Mr. Flynn: Yes, register number 1289; it is shown at the extreme left-hand end of the map. I offer this map under the same conditions as the other official maps, namely, that the photostat which we offer as the exhibit covers that portion of the map which has to do with the present controversy.

Mr. Cass: We object, if the Court please. The same objection as entered as to the other maps, and in addition [328] thereto, there is nothing on it to show that the map itself was ever prepared by Monsarrat.

The Court: The same ruling. Received in evidence as Territory's Exhibit 13, in evidence.

(The map referred to was received in evidence as Territory's Exhibit No. 13.)

Q. (By Mr. Flynn): Mr. Newton, I show you a large map bearing the following identification, "Hawaiian Government Survey, W. D. Alexander, Supt. Molokai. Middle and west sections. Map and survey by M. D. Monsarrat. Scale: 1/24,000 or 2,000 feet equals 1 inch. 1886. Being registered map No. 1288." I will ask you whether you have seen this map before?

A. Yes. I have consulted this map also.

Q. Did you consult or check this map in performing the survey work we have mentioned with regard to the northern boundaries of Kahanui, Apana 3?

A. Yes, sir.

(Testimony of H. E. Newton.)

Q. Is this an official registered map in the records of the survey department of the Territorial Government? A. Yes, sir, it is.

Mr. Flynn: I offer this map in the same manner as the other maps, that is to say, the photostatic copy.

Mr. Cass: Same objection.

Mr. Flynn: (Continuing with offer) —of the exhibit will be substituted for the original.

The Court: Same ruling. It will be received in evidence as Territory's Exhibit 14.

(The document referred to was received in evidence as Territory's Exhibit 14.) [329]

Q. (By Mr. Flynn): Mr. Newton, I show you a large map bearing identification as follows: "Working sheet. Hawaiian Government Survey, W. D. Alexander, Supt. Molokai. Survey and map by M. D. Monsarrat, Surveyor. Scale: 1,000 feet equals 1 inch. Dated 1895 and bearing registered number 1890." I will ask you whether you have ever seen this map before?

A. Yes, I have also consulted this map.

Q. In the course of the work on the survey of the northern boundaries of Kahanui?

A. Yes, sir.

Q. Is this an official registered map in the office of the Territorial Survey Department?

A. It is.

Mr. Flynn: I offer this map in evidence in the

(Testimony of H. E. Newton.)

same way, that is to say, a photostat copy of the portions covering the area in litigation here will be furnished.

The Court: Any objection?

Mr. Cass: Same objection.

The Court: Same ruling. It will become Territory's Exhibit 15 in evidence.

(The document referred to was received in evidence as Territory's Exhibit No. 15.)

Q. (By Mr. Flynn): Mr. Newton, I show you a book bearing the title "Molokai Surveys, M. D. Monsarrat, Surveyor. 1885. Field Book 2, register number 359," and ask you whether you have ever seen this field book before?

A. Yes, I have consulted this field book.

Q. Did you consult this field book or any portions of it [330] in the course of your work in boundary surveying as to the northern boundary of Kahanui, Apana 3, on Molokai?

A. Yes.

Mr. Flynn: I will offer as Territory's Exhibit for Identification these photostats, the first page or title page of which shows "Molokai Surveys, M. D. Monsarrat, Surveyor. Field Book 2. 1885. Register No. 359." [331]

* * * * *

The Court: It is being offered solely for identification at this time. Let the field book be marked for identification only as Territory's Exhibit 16.

(Testimony of H. E. Newton.)

(The document referred to was received and marked Territory's Exhibit No. 16 for Identification.)

* * * * *

Q. (By Mr. Flynn): Mr. Newton, from your knowledge of the records of the Territorial Survey Department, can you state whether M. D. Monsarrat was a surveyor in the employ of the Hawaiian Government in 1885? A. He was.

Q. He was? A. Yes, sir.

Q. Can you state whether this field book No. 2 bearing register number 359 is an official record of the survey department of the Hawaiian Government and the Territory of Hawaii?

A. It is. [332]

Q. I will show you, Mr. Newton, a group of photostats, the first page bearing the title "Molokai Surveys, M. D. Monsarrat, Surveyor, Field Book 85, Register No. 359," and ask you whether these pages, which are excerpts from the original book, are ones which you consulted in the course of your survey work as to the northern boundaries of Apana 3, Kahanui, Island of Molokai?

A. Yes, they are.

Q. I will call your attention to various markings or underlinings in red pencil.

Mr. Cass: We have no objection to the underlining and markings.

Mr. Flynn: This is for identification. Thank you.

Q. (By Mr. Flynn): There being some of which

(Testimony of H. E. Newton.)

on each of the pages of these photostats, and ask you whether you know who made those markings and underlinings?

A. They were underlined by myself.

Q. They were underlined by yourself?

A. Yes.

Q. Were the marks on the sketches in red crayon or pencil also made by yourself?

A. Yes, sir, they were made by myself. [333]

* * * * *

Q. (By Mr. Flynn): For what purpose or purposes, Mr. Newton, did you make these underlinings and various markings in red pencil or crayon?

A. I was retracing Mr. Monsarrat's actual field work on this map. I found notes which he took at different stations and at different boundary points and at sights to monuments on the ground in several cases and to triangulation stations.

* * * * *

Mr. Flynn: I will now offer in evidence as an exhibit for the Territory the original Molokai surveys Field Book [334] No. 2, Register No. 359, now in the custody of the survey department as an official record of the Territorial Government, and ask leave at the same time to withdraw the original field book and substitute the photostated pages which the witness has identified. [335]

* * * * *

The Court: Where specifically, in the pages offered, is there reference to the disputed area?

Mr. Cass: Reference to Waihanau is to the upper

(Testimony of H. E. Newton.)

boundary of the other Kahanui and of the northern boundary of Kalamaula.

Mr. Flynn: Pages 109 and 110 bear date August 21, 1885, and show the occupation of station Kaohu by the surveyor Monsarrat, with shots to Kaluahauoni, to waterfall, to Kahanui, to Kalamauli, to Point X, to Kahanui and Kalamaula Y, to Ridge B, to Ridge C, to Dry Tree W. all identified or nearly all—I think all identified in previous testimony in this case as points within Kahanui, Apana 3, the identifications specifically including that of the applicant's surveyor's map and exhibit, on which he points out these locations.

The next pages are 111 and 112, which show Monsarrat occupied Point Y at the boundaries of Kahanui and Kalamaula [336] and took sights to Kauna Gulch, to Point X, at the boundary between Kahanui and Kalamaula, to Dry Tree W and to Point Ridge A. This pair of pages has for its second a number of penciled sketchings on which is shown Kahanui, readily identifiable as some of the lands herein involved, being identified by the Point Y shown on the applicant's map and also the Point Kaluahauoni, which is the triangulation station.

The next pages, 113 and 114, show the surveyor occupied Point Z at the boundary between Kalamaula and Kahanui and took shots to Ridge B and Ridge C, again both of which have been identified as being in the Kahanui, Apana 3 lands, and as to which the surveyor for the applicant made reference.

(Testimony of H. E. Newton.)

The next pages, 129 and 130, again show the Point Kauna Gulch at the boundaries, a three cornered boundary between Kalamaula, Kaunakakai and Kahanui, all sufficiently identified. This also shows Waikolu Gulch on the extreme easterly ends of land identified as Kahanui; it also shows Puu Kaeo, which is the beginning point of the description of Kahanui, Apana 3.

The next pages withdrawn from the field book and photostated are 131 and 132, showing that the surveyor occupied the triangulation station Puu Kaeo and took sights to boundary Point Y, at the boundaries of Kahanui and Kalamaula, boundary Point X and boundary Point Kauna Gulch.

Page 132 being pencil sketches showing Point Puu Kaeo and various boundary delineations.

Pages 133 and 134 showing occupation by the surveyor of station Kaluahauoni and the taking of shots to boundary Point X [337] between Kalamaula and Kahanui, boundary Point Y between Kalamaula and Kahanui, and Kauna Gulch, also to Ridge B, also to Ridge point or rather to boundary Point Z, also to point Ridge A, also to Point K. The second part of that, which is Page 134, likewise contains a pencil delineation of portions of Waihanau Valley, Waialeia Valley, with the identification of boundary Point Y, boundary Point Kauna Gulch, triangulation station Kaluahauoni, also Point K.

The last is pages 141 and 142, showing that the surveyor Monsarrat occupied station Kauna Gulch

(Testimony of H. E. Newton.)

and took sights to Point Ridge A, to Point Y on the boundary between Kalamaula and Kahanui and to Point K. This page 142 contains a sketch showing portions of the boundary, showing Point K, showing boundary Point Y between Kalamaula and Kahanui. [338]

* * * * *

Q. (By Mr. Flynn): Mr. Newton, you have previously testified that you examined a survey of Kahanui, Apana 3, by Mr. Monsarrat. Is that right?

A. Yes.

Q. Did you examine the field notes contained in registered field book No. 359 with relation to the survey of Apana 3, Kahanui, by Mr. Monsarrat?

A. I did.

Q. Did you find in the field notes contained in registered field book No. 359 notes which were identifiable as covering the survey of Apana 3, Kahanui, by M. D. Monsarrat? A. Yes.

Mr. Flynn: I now offer the photostats in evidence.

Mr. Cass: I ask the privilege of cross examining the witness on the points in question.

The Court: The request is granted.

Q. (By Mr. Cass): Mr. Newton, you have said that you have found evidence in this field book bearing upon the survey of Apana 3. Now, excluding the data of the south and westerly boundary, which is surveyed by traverse, will you tell what point you found in this book that was identified by Monsarrat as being points on the northerly and easterly

(Testimony of H. E. Newton.)

boundary which is in dispute, in his notes? [343]

* * * * *

A. Now on page——

Q. The pages are the same?

A. Yes, they are the same. On page 109, from Kaohu station he sights to Kahanui, Kalamaula.

* * * * * [344]

Q. (By Mr. Cass): Will you point out where Monsarrat himself on those notes has stated that this point is a point in the boundary line of Kahanui 3, in the disputed boundary?

A. Well, to go back a little further, he started with letters back and forth, in which they discovered this piece of Kahanui, which was shown to him by some kamaainas, and he was going to——

Q. Just answer the question. The field book is the thing we are talking about.

A. And he actually made the survey and he has marked it "Kahanui." "K. H." would stand for Kahanui, which was this piece of land he was surveying, Apana 3.

Q. He wasn't surveying Kahanui. Where does it say he was?

A. It says it right in here. He took sights to the waterfall and then he took sights to this Point X, which is on the boundary of Kahanui and Kalamaula. Those are the surveyor's field notes.

Q. What boundary of Kalamaula?

A. Kahanui and Kalamaula to an X.

Q. That is the one? [345] A. Yes.

(Testimony of H. E. Newton.)

Q. That is not disputed. It is the undisputed boundary line.

A. I am fixing the boundary. Then he went to Y. Kahanui to Kalamaula Y.

Q. Yes. That is not the question. Show us where he has any points in there marked on the disputed boundary of Kahanui 3. I am not talking about this undisputed boundary down here, this X and Y here, but the boundary that you have run up here or the boundary that is laid down in the application. Where does he say that that survey pertains to that boundary?

A. After he got through making his survey——

Q. Where does he say it?

A. The description was written by Monsarrat.

Q. Where does he say it in his notes, that this is the boundary?

A. You cannot write a description when you are taking sights.

Q. He was not surveying the boundary there. Continue and find out where Monsarrat has said that that is the boundary.

A. Common sense. If he was running between two known lines, it is running the boundary.

Q. Show it. Where does it say so.

A. He took shots to this Y, which is on the boundary.

Q. It is not on the boundary. It is down here in Kalamaula.

A. That is what he says.

Q. Yes.

(Testimony of H. E. Newton.)

A. That he is on that particular boundary. [346]

* * * * *

The Court: Now, Mr. Newton was under direct examination at the termination of the last session or was being examined relative to the mention or the offer of the field book by Mr. Cass, I believe, at the termination of the last session. Do you want to proceed with that phase now, Mr. Cass? [351]

Mr. Cass: The last question asked the witness was a request to him to indicate on the field book notes where any entry appears thereon that specifically refers to any point as being the boundary of Kahanui along the line now in dispute, and he was given overnight to look into the book.

H. E. NEWTON

a witness called by and on behalf of the Territory, having been previously sworn, resumed the stand and further testified as follows:

The Court: Now do you understand the tenor of the question?

The Witness: Yes.

Q. (By Mr. Cass): Do you want to answer it?

A. Mr. Monsarrat plotted these notes in the exhibit here on his work sheet and he showed the north boundary as running through— [352]

* * * * *

Q. (By the Court): Mr. Newton, the question is very direct and concise. Reading from the excerpt

(Testimony of H. E. Newton.)

which you now have in your hand, consisting of several pages of the field book, just read from that excerpt, without any explanation at this time.

A. It doesn't say definitely that it shows the boundaries of Kahanui outside of just the heading; the heading itself refers to the survey of the land of Kalamaula and Kahanui.

Q. The only definite statement is contained in the heading?

A. Kahanui boundary mauka.

Q. Now, you may explain that statement just made in any respect you desire. [353]

* * * * *

A. I will start over again. This survey was made by Monsarrat in 1885 and it is in field book No. 359, recorded in the survey department. On page 111 of the field book. Monsarrat occupied Station Y on the boundary of Kalamaula and Kahanui and took shots to Puu Kaeo and azimuth 297 degrees 17 minutes, and took slope angles, 32 degrees 35 minutes, and then he took a sight to Kaulahuki, 310 degree 32 minutes 30 seconds [354] at an angle of 45 degrees 51 minutes 30 seconds, and he also took a sight to Puu Kaeo. I have already read that.

Mr. Cass: If the Court please, he is merely reading into the record that which has not been admitted. I object to reading into the record this document before it is admitted, and the word for word reading of these notes. Before these notes are admissible it must be proved that these are from the survey attached to the letter for the sale of the property, the survey by Monsarrat in 1886.

(Testimony of H. E. Newton.)

The Court: The objection is overruled at this time. The answer is merely by way of explanation to your preliminary examination on the admissibility of the field book. Proceed.

A. (Continuing): He took a sight to Kauna Gulch Point, 314 degrees 35 minutes 30 seconds and at an angle of 48 degrees 53 minutes 30 seconds. Took a sight to Kahanui and Kalamaula, 142 degrees 7 minutes, angle 237 degrees 25 minutes, to Dry Wood Tree W, 291 degrees 29 minutes, angle 286 degrees 47 minutes. To Point Ridge A, 253 degrees 32 minutes, angle 348 degrees 50 minutes. Then he went to a new station on the Kalamaula boundary, marked X.

Q. (By the Court): Mr. Newton, for the further clarification of all concerned, can you use this map here, or any other map that is now an exhibit here, and explain those as you go along? I do not think the mere reading of those surveys will be of much assistance to any of us.

A. The beginning point is Kaohu station, marked here.

The Court: Let the record show the witness is now making his designation on Territory's Exhibit 10.

A. Shall I start all over again? [355]

The Court: Without reading, if you want to refer to what you have in your hand, just point them out and designate them on Exhibit 10.

A. Most of the points are off this map. But I see a sight to Kaluahauoni, that point there, triangulation station, sighted a waterfall, 297 degrees

(Testimony of H. E. Newton.)

28 minutes. From Kaohu he sighted to a waterfall. He sighted to a point, Kahanui and Kalamaula boundary, Point X, which is this point here. Then he sighted again at boundary Point Y, at that point. Then he sighted on Ridge B. That is this point on the map. And to Ridge C, which is that point. Dry Tree W, this point. I do not see any point or sight to Ridge A. Now he moves his instrument to boundary Point Y, here, and sights to Kaluahauoni station and to Puu Kaeo, to Kaulahuki, and thence he takes a sight to Kauna Gulch, which is this point here, and to Kahanui-Kalamaula boundary X, which is this point, and to Dry Tree W on the ridge, which is this point, then to Point Ridge A, which is here. And now he moves to Kahanui-Kalamaula Point X, which is here, and sights to Kaohu, which is here, a back sight, to various stations. Thence Kahanui-Kalamaula boundary Point Y and then a sight to Z, which is down here. Then the same sights up to Dry Wood Tree W and to Ridge B, at the end of the ridge, and to Ridge C, in between. Thence to Kaluahauoni. And then he moves now to station Z and takes a sight to X, this point, and thence a sight to Puu Kaeo, also a triangulation station, also to triangulation station Kaluahauoni, and then a sight to a waterfall, and thence sights to Ridge B, then Ridge C, this ridge, and then he moved to Puu Kaeo, which is off the [356] board here, and sighted Point Y and X and Kauna Gulch, these three points on the boundary between Kahanui and Kalamaula. And he

(Testimony of H. E. Newton.)

went over to Kaluahauoni station and sighted to Point X on the boundary of Kalamaula and Kahanui; also a sight to Y, on the same boundary, and to Kauna Gulch on the same boundary, and sighted to Ridge B and to Point Z on the Kalamaula-Kahanui boundary, and then a sight to Point K on the Kalamaula-Kahanui boundary. Point K here. And then he goes to Kauna Gulch and thence sets up here and sights to Kaluahauoni, this azimuth, and then he sights on Point Ridge A and then Point Y on the Kalamaula-Kahanui boundary and then Point K, sights to Point K. And that is the end of it. * * * * * [357]

The Court: Mr. Flynn, do you want to proceed with your foundation on the field book?

Q. (By Mr. Flynn): Mr. Newton, you have stated that your surveying work was largely a retracing of the survey by M. D. Monsarrat, as to which you referred, both to his maps and to his field notes. Correct? A. Yes, sir.

Q. You have marked on your maps Points X, K and A. I will withdraw that.

You have marked on your maps Points X, K and A. Have you found these same points on any existing maps by M. D. Monsarrat?

A. Yes. * * * * * [358]

Mr. Flynn: May we see Registered Map 1289?

The Court: Is that Exhibit 13?

Mr. Flynn: I am sorry. 1259, which is Exhibit 11.

The Court: Exhibit 11.

Mr. Flynn: I believe it would be preferable

(Testimony of H. E. Newton.)

to look at the original, even though it is on this exhibit.

Q. (By Mr. Flynn): Mr. Newton, I show you Registered Map No. 1259 and call your attention to the area marked "Kahanui, area 1048 acres," and ask you whether you find on there any of the symbols or letters you have previously pointed out on your map and referred to in the field notes?

A. Point X at the northwest corner of the land of Kahanui under Grant 3437 to Meyer and Point Y, which is on the boundary between Kalamaula and Kahanui, and Kauna Point which is the boundary of Kalamaula and Kahanui and also at the corner of Kaunakakai. Those are the three points I referred to. And also to Point K, which was sighted by Monsarrat on the upper edge of the pali of the Waihanau Gulch, above the top edge of the pali. Thence Point A on the top of the ridge, which is also on the north boundary of Kahanui and a point of beginning of the second grant to Mr. Meyer. That is as far as I went.

Q. (By the Court): What boundaries of Kahanui have you just referred to now, with reference to northeast, south or west?

A. Point A, which is on the north boundary.

Q. North? A. North, yes, Kahanui.

Mr. Flynn: And Point K is on what boundary, Mr. Newton?

A. Point K on Monsarrat's map is on the north boundary [359] of Kahanui.

The Court: Proceed.

(Testimony of H. E. Newton.)

Q. (By Mr. Flynn): Mr. Newton, you have examined the map accompanying the grant, have you not, namely, Grant 3437? A. Yes, sir.

Q. You have also examined the map accompanying Grant 3539? A. I have.

Q. Can you state whether you have checked the map of Grant 3437 against the portion of the map marked "Kahanui" now before you?

A. I have.

Q. Do you find Grant 3437 map to correspond to the map or rather to Kahanui Grant 3437 as shown on this 1886 map of Monsarrat?

A. It does. I have compared them.

Q. You have stated, Mr. Newton, that you have examined much of the work of M. D. Monsarrat?

A. Yes.

Q. You have examined much of his writing?

A. Yes. I know his handwriting.

Q. Can you state whether these points he referred to as Y, X, K and A are in the handwriting of M. D. Monsarrat?

A. Yes, they are all Monsarrat's. [360]

* * * * *

Q. (By Mr. Flynn): Mr. Newton, I will ask you to look at Registered Map 1289.

The Court: That is Exhibit 13 of the Territory.

Q. (Continuing): Which is M. D. Monsarrat's map, work sheet of 1886, on a scale of 2,000 feet to the inch, and I will ask you to look at the portion of it shown within the boundaries of Kahanui, Apana 3, 1048 acres. From an examination of this map and from an examination of the map accom-

(Testimony of H. E. Newton.)

panying the grant incorporated into Grant 3437, can you state whether the map on the grant corresponds to Kahanui as shown on this map?

Mr. Cass: If the Court please, we object to the question. We object to the use of the two maps until it is shown whether or not the sketch on the map was taken from the grant or the sketch from the grant was taken from the map. If they do compare it is just possible that the sketch on the map is taken from the grant sketch, without survey.

Mr. Flynn: That is up to proof by him.

The Court: Let counsel finish his objection.

Mr. Cass: There is no evidence in here as to when these marks were made on the map. The witness testified it was a progressive map. [361]

* * * * *

Mr. Flynn: If the Court please, I wish to challenge that statement by counsel as to what the witness testified to as a progressive map. I believe if the record were to be examined it would be found to be only a statement by counsel. He has not been asked that question.

* * * * *

The Court: Do you want that testimony to be read?

Mr. Flynn: I would be willing to defer checking that testimony until counsel finishes his objection. We may be able to proceed without it. If not, we will then ask the testimony be rechecked. [362]

* * * * *

(The question was read by the reporter.)

(Testimony of H. E. Newton.)

Mr. Cass: My objection is that there is no probative value unless it is shown that the sketch on the grant was taken from the map, and not the map sketch was entered from the grant or from some other sketch.

The Court: For the record, Mr. Flynn, what is the relevancy?

Mr. Flynn: The only logical and sound inference is that this map of 1886 shows Kahanui to be substantially identical in proportion and scale to the map accompanying the grant. That is the minutely explicit evidence, that the map in the grant was based on this map.

The Court: The objection is overruled. Proceed.

Q. (By Mr. Flynn): I will ask you, Mr. Newton, whether upon examination you can state whether Kahanui, Apana 3, 1048 acres, as shown on this work sheet of M. D. Monsarrat, of 1886, corresponds to the map accompanying Grant 3437?

A. Offhand, I would say it does, without having the grant itself.

Q. Just a minute. Let me offer you the grant to examine, which is Exhibit B, I believe.

A. They are practically the same.

Q. All right. Now, I will ask you to examine Registered Map 1288.

The Court: Exhibit 14.

Q. (By Mr. Flynn): Being a map of 1886 by M. D. Monsarrat, on a scale of 2,000 feet to the inch, and ask you once again to examine the map accompanying the grant, and the showing on this

(Testimony of H. E. Newton.)

map being "Kahanui 1048 acres in Apana 3," and ask [363] you if they correspond?

A. The boundaries correspond.

Q. The boundaries do correspond?

A. Yes.

Q. I will ask you specifically about the correspondence, if any, of the boundaries at the western end of the northern boundary, and ask you whether they do correspond, and by "western end" I am referring specifically to points shown on your map as Points X to A?

A. Yes, they do.

Q. I will ask you, from your work on this survey problem, including all of the work you did, all of the maps and documents you have examined and upon which you have based your conclusions, I will ask you whether you can express an opinion, I will ask you if you can express an opinion as to whether the map accompanying Grant 3437 and incorporated into that grant was based upon or taken directly from the two maps of 1886 of M. D. Monsarrat that you have just examined?

A. Yes, they were taken from Mr. Monsarrat's map, his survey and map both.

Q. In your own survey work on this boundary problem, you stated you were retracing the footsteps of the original surveyor Mr. Monsarrat. Isn't that right?

A. Yes.

Q. In doing so, did you refer to the various points in his field book 359 you read off a while ago?

A. I did.

Q. Did you find from your own examination

(Testimony of H. E. Newton.)
that those points checked with the maps of Monsarrat you have examined? [364]

A. Yes. I found his marker points there; I checked on those and also located the edge of the pali, the top edge of the pali along the top edge of Waihanau Valley.

Mr. Flynn: I offer the field notes in evidence, your Honor.

The Court: The field notes have been offered, Mr. Cass. Any objection?

Mr. Cass: I have stated by objection to the field notes. And the further objection that this grant was made upon a survey of Monsarrat attached to the grant and that there has been no evidence that this is a field book or field notes of that survey. In fact, the letters accompanying or about the same date, of Monsarrat to Alexander, show that he was then engaged in an official survey of different lands and that the survey in question had nothing to do with the boundary now in dispute.

The Court: Objection overruled. Field Book No. 2 of Mr. Monsarrat will become Territory's Exhibit 16 in evidence.

(The document referred to was received in evidence as Territory's Exhibit No. 16.)

The Court: Are you going to arrange those for the purpose of an exhibit, Mr. Flynn, the photos?

Mr. Flynn: Yes. If the Court please, I will ask leave to withdraw the field book itself and substi-

(Testimony of H. E. Newton.)

tute the pages as the Territory's exhibit inasmuch as the pages include the only material on which the field book will be referred to.

The Court: Any objection, Mr. Cass?

Mr. Cass: No objection.

The Court: Let the substitution be made. [365]

* * * * *

Q. (By Mr. Flynn): Mr. Newton, referring to your map, which is Territory's Exhibit 10, I will call your attention to the red markings "waterfall," and you have up above the Roman numeral (I), further on and just directly above, mauka, of that point you have a mark for "waterfall" and II, a third waterfall slightly farther above, marked III. Did you take sights to this first waterfall from any position? A. Yes, I did.

Q. From where?

A. From Kaohu triangulation station and from Point Z and [366] Point X.

Q. Were any of those same sights taken by Monsarrat; and you may refer to the field notes if you wish.

A. Yes. He took a sight to a waterfall to boundary Point X.

Q. Just to the waterfall. Did you find such?

A. Yes.

Q. From what point?

A. From Kaohu triangulation station to waterfall, bearing azimuth of 297 degrees 28 minutes.

Q. Did you find whether that bearing checked with your own bearing on the ground?

(Testimony of H. E. Newton.)

A. Yes.

Q. Does it check?

A. It checks on the ground.

Q. I note numbers here at the first waterfall, just makai of the red, marked 2005, just makai of the first marker 2117. Are those your bearings?

A. Yes. That is the elevation that I observed.

Q. Those were the elevations you observed?

A. Yes.

Q. You made the elevation measurements?

A. Yes.

Q. Is that likewise the case as to the third waterfall, where you have a number 2210? A. Yes.

Q. I am sorry. That is the second waterfall, No. 2210? A. Yes.

Q. The third waterfall, No. 2272?

A. Yes, sir. Those are my elevations. [367]

Q. All the way up there? A. Yes.

Q. You show a fourth waterfall several hundred feet above the third and the identifying marker IV, the elevation 2309, and similarly a fifth one still going makai?

A. Yes. Those are all mine.

Q. With the V. Continuing on up to IX above—I will withdraw that—IX and far on up to X. Did you go up the entire area from Waterfall No. 1 to Waterfall No. 10 along the course of the stream?

A. I did.

Q. Will you describe the general topography on your way from Waterfall No. 1 to Waterfall No. 9? I refer to that number because I think it is shown

(Testimony of H. E. Newton.)

to be slightly mauka of the boundary as drawn or as shown by this map, and therefore into the undisputed or upper portions of Kahanui, Apana 3, if the Court please.

A. I did not quite get the question.

Q. I ask you to describe the general topography are you traveled from Waterfall No. 1 to Waterfall No. 9.

A. These three waterfalls, 1, 2, 3, are very high and impassable. The falls up above there are not so high. There are some good swimming pools there. Between Pool 5 and Pool 8 the stream takes an "S" bend and there is a ridge coming down from the westerly side down to the pool, which I believe is Waiau Pool, and another ridge which comes down from the peak on this spur ridge between Kalawao and Makanalua there, comes down the ridge, runs right down to the stream so that the two ridges cross each other on either side of the [368] stream. This is all enclosed in. You cannot see beyond this point. You don't get a clear view because it is shut off by those two ridges coming down together, crossing each other. And above that the stream begins to branch out and it is not one stream from there on, after you pass that boundary.

Q. Approximately below Waiau is there a single stream?

A. Yes. This is a single stream below the Waiau Falls.

Q. Now, Mr. Newton, did you also go along the

(Testimony of H. E. Newton.)

top of the pali from points or through points beginning at X and through K? Did you personally go along there?

A. Yes. I located the edge of the top of the pali all the way through. I took in all the little angles and from my line there I passed through Point K, which Monsarrat showed in his field notes, and over to a spur ridge running down towards the stream and crossing the stream about the top of the Waiau Pool there and thence up the ridge on the easterly side of the stream, up to Monsarrat's Point A on the top of the peak, on the top of the ridge there, and this point is on the mauka boundary of Grant 3437, and it is also the initial point or point of beginning of Grant 3539. Then it continues all along the top of the ridge to Waihanau and to Kaluahauoni triangulation station.

Q. You stated, Mr. Newton, as you come up the stream and as you approach the area you have referred to as where the two ridges appear to overlap or where the two ridges do overlap, one from the west and one from the east, the appearance is one of closing off of the valley.

A. Yes, you get that impression. [369]

* * * * *

Q. (By Mr. Flynn): Mr. Newton, I was referring to your testimony of a few minutes ago, that as you walked up the stream and reached the point you have shown to be the vicinity of Waiau Falls you found a closing off appearance in topography. I am asking you what you find as you are on the top

(Testimony of H. E. Newton.)

of the ridge, walking along from Point K to the point marked "pipe"?

Mr. Cass: We object. The witness was asked whether it appeared to be closed off. Counsel is assuming that the witness answered. That question was not allowed. There is no such evidence here that the witness said that it appeared to be closed off. We will admit that there is a different appearance in the valley there that you can see at that place. If that is the answer to it. But I cannot see how that is material unless it is proven that Monsarrat saw it.

The Court: Objection overruled on that ground.

* * * * * [371]

A. I think I answered that. I followed the top of the pali and thence down a spur ridge running in an easterly direction and crossing the stream at Waiau Falls, thence up another spur ridge on the east side, which takes you right up to the point, to a peak at the Point A of Monsarrat, on top of the ridge. And that I know, from where I have seen the ground, that gives you the idea that this portion is one valley, it gives you the impression that this is the head of a valley.

Mr. Cass: If the Court please, we object to the impressions and move that the witness' statement of his impressions be stricken.

The Court: The last part of the answer, as to his impression, will be stricken.

Mr. Flynn: If the Court please, I do not to belabor this, but that description is sufficient to show

(Testimony of H. E. Newton.)

what the witness found on the ground. It is not a matter that is determined by his use of the word "impression." It is all a portion of the descriptive language of what his findings were.

The Court: The last part of the answer was unqualifiedly the use of the words "give the impression." That is the [372] matter at issue here on this witness' testimony. The ruling will stand.

Proceed.

Mr. Flynn: I will note an exception, if the Court please.

The Court: An exception may be noted.

Q. (By Mr. Flynn): Now, I will ask you, Mr. Newton, whether any of the other falls along this stream and above or mauka of the falls 3 are impassable?

A. Some would be passable if you went right through the fall but most of them you can cut a trail or something around, clear to the top.

Q. I believe you stated that the falls in the vicinity of Waiau are the biggest along the stream after the first three falls. Is that correct?

A. Yes.

Q. And what is the elevation of that falls?

A. That falls is 22 feet.

Q. 22 feet high? A. Yes.

* * * * * [373]

Q. (By Mr. Flynn): I call your attention, Mr. Newton, to Applicant's Exhibit A, which is a map previously identified as having been made by Mr. McKeague. I now call your attention to the red

(Testimony of H. E. Newton.)

printing on this map showing "M. D. M's Point X." Does that correspond to where you placed Point X on your map? A. It does.

Q. I will show you where, in red printing, there is the mark "K". Does that correspond to where you placed Monsarrat's Point K on your map?

A. Just about the same place.

Q. Similarly, as to M. D. M's Y? A. Yes.

Q. And M. D. M's Ridge A? A. Yes.

Q. Now, I will ask you to take a blue pencil, Mr. Newton, and draw on this map, Applicant's Exhibit A, the line or [374] approximate line of the northern boundary of Grant 3437 to R. W. Meyer as shown by your survey.

Mr. Cass: If the Court please, we object to his marking the map with anything as shown by his survey. If he wants to show on the map where the ancient government monuments are there, all right, but he has not so far identified in his own survey any boundary line at all. He has identified an overlay of government maps but his boundary line is not—he cannot fix a boundary line. All he can do is trace the steps of the other surveyor. And if he wants to mark up there where his ground line follows the government survey, as such a line we have no objection, but not as testimony that they are lines of boundary.

The Court: The question of boundary is your ultimate determination. These matters are not of very much probative value. I don't think there is any objection to the relevancy or materiality of it.

(Testimony of H. E. Newton.)

Are there any marks or symbols on there in green or rather blue?

Mr. Flynn: There is one area in blue.

The Court: Use a green pencil then. The objection is overruled.

The Witness: Do what now? Mark out the Monsarrat line? Please read the question.

(The question was read by the reporter.)

The Court: Hand the witness a rule if he needs it.

The Witness: No, I don't need it.

(The witness did as requested in the question.)

Q. (By Mr. Flynn): That is enough. I was only asking for the area that was in between Ridge Point A and Point X. [375]

Mr. Flynn: Now, let me see some of these Territory's exhibits, from 11 to 15, beginning with 11.

Q. (By Mr. Flynn): I will show you, Mr. Newton, Territory's Exhibit 11, being working sheet of M. D. Monsarrat map, 1886, on which is shown Grant 3437 to Meyer, Kahanui, area 1048 acres. I will correct that latter statement. On which is shown Kahanui, area 1048 acres, and in the writing below "Apana 3," and ask you whether the northern boundary of Kahanui, Apana 3, as shown on this map corresponds in any way to the boundary between Points X and A as you have now drawn them on this map, which is Applicant's Exhibit A?

* * * * *

(Testimony of H. E. Newton.)

A. They do. Very close.

Q. Now, I will show you Territory's Exhibit 12, which is a map and survey by M. D. Monsarrat, 1886, and ask you to make the same comparison between Kahanui, Apana 3, as shown on this map, insofar as it concerns the western end of the [376] northern boundary of Kahanui, Apana 3, and in comparing it with that boundary line you have drawn in green pencil on Applicant's Exhibit A, ask you whether the boundaries correspond?

A. Yes, they compare very closely with Monsarrat's work sheet.

Q. Very well. I will similarly show you Territory's Exhibit 13, which is Hawaiian Government Survey, Molokai, middle section, by M. D. Monsarrat, Surveyor, Scale: 2,000 feet to 1 inch, working sheet, again showing you on this 1886 map Kahanui, Apana 3, 1048 acres, and call your attention to the western section of the northern boundary of Kahanui, Apana 3, and ask you to compare the same with the green line you have drawn on Applicant's Exhibit A, and ask you whether those boundary lines correspond?

A. Yes, they do; they correspond very closely.

Q. I will similarly show you Territory's Exhibit 14, map and survey by M. D. Monsarrat, Scale: 2,000 feet to the inch, 1886, showing Kahanui, Apana 3, 1048 acres, and ask you whether as shown on this map the western end of the northern boundary of Kahanui, Apana 3, corresponds to the

(Testimony of H. E. Newton.)

green line you have drawn on Applicant's Exhibit A?

A. It does; it corresponds to the line I have drawn on my map.

Q. To the line you have drawn in green pencil?

A. In green pencil on Exhibit A of the applicant.

Q. I will show you Territory's Exhibit 15, working sheet, Hawaiian Government Survey, survey map by M. D. Monsarrat, Surveyor, Scale: 1,000 feet equals 1 inch, 1895, and ask [377] you to examine on this map the area shown as Kahanui, Grant 3437, Meyer, and ask you to compare this map with Applicant's Exhibit A and specifically comparing the boundary line at the north boundary, the western end of the north boundary, as you have shown it in green pencil, and ask you whether that corresponds to this map which is Territory's Exhibit 15?

* * * * *

Q. (By Mr. Flynn): In retracing Mr. Monsarrat's work, where did you find his northern boundary of Kahanui, Apana 3, as compared with where you have placed the northern boundary of Kahanui, Apana 3?

A. Practically the same.

Q. Practically the same? A. Yes.

Q. What point or points did you find in Mr. Monsarrat's work to correspond to points that you have checked yourself along [378] the northern boundary of Kahanui, Apana 3?

A. Beginning at the northwest corner there, at

(Testimony of H. E. Newton.)

Point X, and following along the top edge of the gulch and passing through K and thence continuing on the top of the pali, in a southerly direction, and thence running down a spur ridge to the east and crossing the stream at about the south bend there, and up a spur ridge on the east side of the stream, right up to Monsarrat's Point A, the peak at the top of the ridge overlooking Kalawao, thence continuing along the top edge of the ridge and around the head of Waialeia Valley to Kaluahauoni station. That is just the northerly boundary.

Q. In that last answer, Mr. Newton, you have referred to your map, which is Territory's Exhibit 10, have you not? A. Yes.

* * * * * [379]

Q. (By Mr. Flynn): Mr. Newton, you have stated that you have located the northern boundaries of Kahanui, Apana 3? A. Yes.

Q. What lands adjoin the northern boundary of Kahanui, Apana 3, between points as shown on your map, Exhibit 10, Points X and A?

A. Starting from the Point X on the Kalamaula-Kahanui boundary, the northern boundary of Grant 3437 runs along the top edge of the pali along Waihanau Valley.

Q. And Waihanau Valley is in what lands, if you know?

A. Waihanau Valley is in the land of Makanalua.. * * * * * [380]

Q. (By Mr. Flynn): Is any part of the Waihanau Valley in the land of Kahanui? A. No.

(Testimony of H. E. Newton.)

Q. I show you, Mr. Newton, Territory's Exhibit 11, the 1,000 foot to the inch working sheet of Monsarrat, dated 1886, and call your attention to Kahanui, Apana 3, and ask [381] you whether the words "Waihanau Valley" appear on this map?

A. It does.

Q. I will ask you to examine this map and state if you can tell where the boundaries of Waihanau Valley are with relation to the southern or mauka end of that valley?

Mr. Cass: We object to the witness stating where the boundary of the valley is unless it is so delineated on the map.

Mr. Flynn: I am referring to the delineation, if any, on the map.

The Court: Objection overruled.

A. Makanalua?

Q. (By Mr. Flynn): Waihanau Valley.

A. Waihanau Valley. Waihanau Valley starts quite a ways down below Kaohu triangulation station and the boundary runs up along the top edge of the pali and over or to this X, Monsarrat's Point X, at the northwest corner of Kahanui and Makanalua, thence follows along the top edge of the pali, passing through Point K, according to this map, and through the word "Waiau" and up to Point A, thence following along around the head of Waialeia——

Q. No. My question was only as to Waihanau Valley.

A. Oh. Waihanau Valley. Just up to Point A at

(Testimony of H. E. Newton.)

the top of the ridge, the north boundary of Kahanui.

* * * * * [382]

Q. (By Mr. Flynn): I will show you Territory's Exhibit 13, Mr. Newton, which is the work sheet of M. D. Monsarrat, surveyor, scale of 2,000 feet to the inch, and call your attention to where the words "Waihanau Valley" appear and ask you whether any portion of the southern boundary of Waihanau Valley, where it joins what appears to be the northern boundary of Kahanui, Apana 3, is shown on this map?

A. The valley seems to stop at the northern boundary of the land of Kahanui.

Q. As shown on this map?

A. As shown on this map.

Q. I will show you, Mr. Newton, Territory's Exhibit 12, which is a map and survey of M. D. Monsarrat, 1886, and point out to you that this map contains the words "Waihanau Valley" and also "Kahanui, area 1048 acres, Apana 3", and ask you whether Waihanau Valley as shown thereon, or rather ask you if you can state where the southern boundaries of Waihanau Valley are shown on this map?

A. The photostat shows the boundary running along the northern boundary, it stops at the northern boundary of the land of Kahanui.

Q. Examining this map, Mr. Newton, can you locate approximately the point of the waterfall

(Testimony of H. E. Newton.)

shown on your own map as Waterfall I, your own map being Territory's Exhibit 10?

A. Yes, I can. [383]

Q. Can you mark it in red pencil, please?

(Witness does as requested.)

The Court: For the record, what symbol or writing is inserted?

Mr. Cass: Red?

Mr. Flynn: It is just a blot at this point. May I insert the figure 1, No. 1? It is difficult to tell with this pencil.

* * * * * [384]

Mr. Flynn: I had just asked the witness to locate and mark the approximate point of the Waterfall I, as shown on his own map, which is Territory's Exhibit 10. We had just made some markings in red pencil. I will ask leave, which I am sure won't be disputed, if I will make the marking in blue ink where the witness had been.

The Court: Indicating the waterfall.

Mr. Flynn: Indicating Waterfall No. I.

The Court: Very well.

Q. Calling your attention, Mr. Newton, to the scale of this map, which is 1,000 feet to the inch, ask you to estimate the distance from the waterfall, as you have marked it there, from Waterfall No. I to the extreme southerly or mauka end of Waihanau Valley? A. About 3,000 feet.

Q. To what point did you show that marking, as relating to your own map, Territory's Exhibit 10?

A. From the Waterfall No. I up to Point A,

(Testimony of H. E. Newton.)

the peak on the top of the ridge overlooking Waialeia Valley.

Q. Can you locate the approximate point, Waiau, on this map, Territory's Exhibit 12, from close to the point that you have just marked?

A. The point Waiau—No, no, I take it back. Are you referring now to the approximate location of Waiau?

Q. Yes. I have marked this with a circle in blue ink. I will write the words "Waiau,"—I will ask you to give the approximate distance from the waterfall to the circle marked on this map, Territory's Exhibit 12, calling your attention to the waterfall marked with a cross, the other being marked I, to indicate the—— [385]

A. Nearly 2,000 feet.

Q. Now, Mr. Newton, I will show you Territory's Exhibit 15, photostat of the working sheet, survey map of M. D. Monsarrat, scaled 1,000 feet equals one inch, dated 1895, and again call your attention to the lands we have already discussed, one show Kahanui, 3437 Meyer, the other showing Waihanau Valley itself, also showing the point previously referred to as Waiau, ask if you can locate on this map the approximate location of the same Falls, No. I, as shown on your map, Territory's Exhibit 10?

A. Approximately through the second letter "a,"—approximately through the second letter "a" in the word "Waihanau."

(Testimony of H. E. Newton.)

Q. The second letter "a" being the "a" following the letter "h" in the word "Waihanau?"

A. Yes.

* * * * *

Q. I ask you, Mr. Newton, whether any portion of the words "Waihanau Valley" are written or printed in this map at a [386] point or points above the location of Falls No. I, as you have placed it on there?

A. The word "Valley" is entirely above the Waterfall No. I.

Q. Are not the letters "nau," the last letters of "Waihanau" also entirely above Waterfall No. I?

A. Yes. That is my recollection. It takes in the letters "nau" and "Valley."

Q. And by "above" you mean mauka, or southerly, of the Falls, do you not?

A. Mauka or southerly, they are both the same.

Q. Now, Mr. Newton, we have previously referred to a survey, rather the description of Makanalua, which is Territory's Exhibit 9, in which you stated you referred to, in the course of your surveying work on this boundary question, and I call your attention to the following portion of the description by Pease, reading as follows: "following always a stone wall separating this land from the land called Pohakuloa, thence South 12° East 15 chains, and thence to the top of the mountain ridge called Hoolae, thence following along the top of this Pali bounding Makanalua gulch or ravine on its easterly side, to a certain mountain peak at

(Testimony of H. E. Newton.)

the head of said ravine called Kaulahuki." I will call your attention to the latter portion of this description, on the second page thereof, reading as follows: "To the foot of the mountain ridge called Ililika, thence to the top of Ililika, and from thence following along the top of the Pali bounding Mākanalua gulch or ravine on the West, to a certain mountain peak at the head of said gulch called Kaulahuki," did you draw any,—did you form any opinion from your examination of all of these materials that have been placed in evidence and which you [387] discussed as being the basis for your own work as to the location of the mountain peak called Kaulahuki?

Mr. Cass: We object to the opinion of the witness.

The Court: Objection overruled.

A. I have.

Q. Can you show on your own map, which is Territory's Exhibit 10, where, on your own map, Kaulahuki, as set forth in Pease's description, Territory's Exhibit 9, is located?

A. It is marked Ridge Point "A," which is on the North boundary of Grant 3437 Meyer, and the initial point of Grant 3539 to Meyer. It is the peak on the top of the ridge overlooking Waialeia Valley.

Q. Now, I will ask you the same question, Mr. Newton, with reference to the map which is Applicant's Exhibit "A," and ask if you can state

(Testimony of H. E. Newton.)

where on that map Kaulahuki, as shown in the description of Pease, is located?

A. This hill (witness indicating). There was some evidence that it was 3.40 acres. Otherwise I will have to identify it by these arrows here pointing to the space on the top of the ridge and marked "Portion of Grant 3539 to R. W. Meyer."

Q. Looking at this map, Exhibit "A", is that area, or any portion marked in the M. D. Monsarrat's survey as Ridge "A"?

A. Yes, it is marked on the map here "M. D. Monsarrat Ridge A."

Q. Now, what did you do to ascertain the location of Kaulahuki, Mr. Newton, what did you refer to, what material did you refer to, what did you find on the ground?

A. I referred to Pease's survey of the Land of Makanalua, and also took a photograph,—had one done by my assistant, who was working with me. Took a picture of that Valley [388] looking up Waihanau Valley from a point near Kaohu Station. There is a picture which shows a peak on the ridge overlooking the Waialeia Valley.

Q. I show you this photograph, Mr. Newton, and ask you if you can identify it?

A. Yes, this is the picture that we took—

Q. Just a minute. You say this is a picture that you took, or that was taken?

A. Of the waterfalls in the Waihanau Valley. That was the idea of taking the picture, to take a

(Testimony of H. E. Newton.)

picture of the waterfall, but we got the background also.

Mr. Flynn: I will show this to Mr. Cass, if the Court please.

Mr. Cass. This is offered for identification?

Mr. Flynn: I offer it in evidence.

Mr. Cass: No objection.

The Court: It becomes Territory's Exhibit 17 in evidence.

(The photograph above referred to was received in evidence and marked Territory's Exhibit 17.)

Q. Now, Mr. Newton, I will ask you to examine this photograph, and ask you whether you can locate on it the waterfall you have referred to as Waterfall Roman numeral I on your own map, Territory's Exhibit 10? A. Yes, I can.

Q. Can you point to it please?

A. (Witness indicates.)

Q. Can you mark it in a small circle with ink?

A. (Witness does so.)

Q. Can you look at this photograph, Mr. Newton, and locate [389] on it the point you have referred to as Pease's Kaulahuki? A. I can.

Q. Will you point it out, please?

A. Yes. (Witness indicating.)

Q. Will you encircle that point with pen?

A. (Witness does so.)

Q. Now, Mr. Newton, you have stated that this

(Testimony of H. E. Newton.)

view as shown in this photograph is familiar to you? A. Yes.

Q. You have referred to this peak shown in the photograph as Kaulahuki, can you state whether or not there are other peaks from this view, at the point where this picture was taken?

A. No peaks, no prominent peaks.

Mr. Flynn: If the Court please, if counsel has no objection I will write in "waterfall" at one point and "Kaulahuki" at the other.

Mr. Cass: No objection.

Q. Mr. Newton, you have also stated that you also examined Pease's Map of Makanalua?

A. I have.

Q. From an examination of that map, and examination of the description by Pease, can you state whether Kaulahuki, shown on that map, corresponds to the point Kaulahuki as you have marked it on this photograph?

A. I didn't show any Kaulahuki there, but the site I can identify as Kaulahuki—

Q. I am referring to Pease's map?

A. On Pease's map, oh, yes.

Q. Mr. Newton, I will ask you to refer to your own map [390] again, Territory's Exhibit 10, and ask you if you can state what the points are on that map, shown to be marked in green pencil?

A. Those were black points which Mr. Monsarrat put on the top edge of the ridge, and he took observations for his survey down in the Leper Settlement.

(Testimony of H. E. Newton.)

Q. Do you know when, or approximately when, he was making the survey down in the Leper Settlement?

A. I have really forgotten the exact date, around 1890 somewhere,—probably 1895.

* * * * *

Q. How were they plotted on there, if you know?

* * * * *

A. These points were observed by Monsarrat, which we studied from his survey in the lower section, and on different sections he would intersect these at the edge, at the Pali of the ridge.

Q. How, or from what source do you know that those points were made by Mr. Monsarrat, Mr. Newton? [391]

A. I will follow it through in his field books,—field notes.

* * * * *

The Court: They become Territory's Exhibit 18 for Identification.

(The documents referred to were received and marked Territory's Exhibit 18 for Identification.)

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[392]

Mr. Flynn: I now offer as Territory's Exhibit 18-A for Identification, a pack of photostats, the title, "Molokai Survey, M. D. Monsarrat, Surveyor, Field Book 8, Register No. 365," bearing date 1894, and ask that they be marked for identification.

(Testimony of H. E. Newton.)

The Court: They may be marked Territory's Exhibit 18-A for Identification.

(Documents referred to were marked Territory's Exhibit 18-A for Identification.)

* * * * *

Q. Can you state, Mr. Newton, whether the points marked in green pencil on your map, Territory's Exhibit 10, are based upon data contained in Territory's Exhibits 18 and 18-A for Identification? A. Yes.

Q. Are they? A. Yes.

* * * * *

[393]

Q. (By Mr. Flynn): Mr. Newton, I show you a cardboard type envelope, bound with a pink string or ribbon, entitled, "Document No. 1369, Grant 3437, description by R. W. Meyer, Kahanui, Molo-kai. Letter from J. F. Brown, re above 11/28/05. Tracing enclosed," and I will ask you to examine them and say whether you recognize them?

A. Yes, I have seen these before.

Q. I will ask you, Mr. Newton, whether these are from the files and records of the survey department of the Territory?

A. Yes, they are filed with the records of the survey department.

Q. The identification at this time of the envelope, Document 1369, is that an identifying number of the survey department [397] records?

A. It is. * * * * *

Q. (By Mr. Flynn): I believe you stated, Mr.

(Testimony of H. E. Newton.)

Newton, that you were acquainted with J. F. Brown during his lifetime? A. Yes, I was.

* * * * *

Q. Do you happen to know whether prior to the time Mr. Brown was in the land department he had been with the survey office? [398]

A. Yes; he was a surveyor.

Q. Have you had occasion in the past to refer to Mr. Brown's work or any portions of his work?

A. Yes, I have.

Q. Have you examined any of his writings or specifically his signature?

A. Yes, I know his signature.

Q. I will ask you if on the first page of the papers accompanying this envelope marked "Document 1369" you can identify the signature at the bottom of that page?

A. Yes. That is signed by J. F. Brown himself.

Q. I will ask you if on the third page of those pages included in this envelope you can recognize the signature at the bottom of the page?

A. Yes, I do; that is Brown's signature.

Q. This is the same J. F. Brown who, according to the records now exhibits in this case, drew the map and description for Grant 3539, is it not?

A. Yes, that is right. The spur ridge.

* * * * *

Q. And Mr. J. F. Brown is dead now, is he not?

A. Yes, he is dead.

* * * * *

(Testimony of H. E. Newton.)

Mr. Flynn: I offer the photostats in evidence as [399] Territory's Exhibit 19.

* * * * *

(The documents referred to were received in evidence as Territory's Exhibit 19.)

* * * * *

Q. Mr. Newton, do you speak or understand the Hawaiian [402] language? A. I do.

Q. Do you speak it and understand it both?

A. Well, I can speak it fairly well; I can understand it a little better.

Q. You can understand it a little better. Do you know the meaning of the term "Kaulahuki"?

A. Yes, I do.

Q. Will you state to the Court what the meaning of that term is?

A. "Kaulahuki" means to pull with a string or rope, like in a tug-of-war perhaps.

Q. Like in a tug-of-war?

A. Something like that. It could be in a tug-of-war game, for instance. It could be two sides pulling. That would be Kaulahuki. But generally it means to pull with a string or rope.

Q. From your knowledge of Hawaiian, has it been used as referring to the type of situation where there is a pulling of the rope from the two ends, as against a middle area of it, such as a tug-of-war?

A. After seeing the applicant's map here, I think that just about fits the case.

Q. Will you point that out, please?

(Testimony of H. E. Newton.)

A. Generally they have a small mound in between the two teams, on either side, and this would be that mound, that is in the middle. And we have two very narrow ridges and one can barely walk here and across there.

Q. Pointing to Applicant's Exhibit A, Mr. Newton, will you [403] identify those points more specifically?

A. The peak itself would be identified on Applicant's map as a portion of Grant 3539 to R. W. Meyer. The highest point naturally would be the peak. Some narrow ridges would be the space between the middle point and the two teams that are on either side; one team would be this R. W. Meyer piece, being a portion of 3437, and the other team would represent Grant 3539 to R. W. Meyer. You have to have in a tug-of-war game a team on either side with a mound in the middle, and the space in between the two teams, and you pull one way or the other to win. I believe that is where they got the name "Kaulahuki" itself.

Q. From one of the points in Field Book No. 359, which is Territory's Exhibit 16, I believe, you made reference to a point referred to by Monsarrat as "Kaulahuki." I will ask you to find that in this field book, or rather these photostats, and I will also ask you to examine the original map No. 1259. The photostat will be good enough. Have you located that, the mention of that point in the field notes, Mr. Newton?

A. Yes, in several places.

Q. Now, I will ask you to examine Territory's

(Testimony of H. E. Newton.)

Exhibit 11 and ascertain whether you can locate the point "Kaulahuki" as shown on this map and ascertain whether it is correlated to the one shown in the field notes?

A. Kaulahuki as referred to in Monsarrat's field book is the name of a triangulation station which Monsarrat used in his survey.

Q. And this triangulation station named Kaulahuki is where with relation to Kahanui, Apana 3? [404]

A. It is pretty nearly on the south boundary of Kahanui, Apana 3, and it is south of Grant 3437 to R. W. Meyer.

Q. And this map being 1,000 feet to the inch, will you estimate how far south it is of the nearest boundary of Kahanui, Apana 3?

A. About 4,000 feet.

Q. About 4,000 feet?

A. Yes. South of the south boundary.

Q. From your study of all these various maps and these field notes, Mr. Newton, does that Kaulahuki triangulation station point have any relation to the Kaulahuki you have previously referred to as used by Pease? A. None whatever.

Q. None whatever. Now, while I have before us Territory's Exhibit 11, the 1,000-foot to the inch working sheet of M. D. Monsarrat, 1886, I will call your attention to the area at the north boundary of Kahanui, Apana 3, and ask you, Mr. Newton, what the line markings are, for example, beginning at the point you have previously identified as Point

(Testimony of H. E. Newton.)

X? Just a minute. I am sorry. The original map is still better. The lines I am referring to are pencil lines. I will ask you what they are intended to describe or represent?

A. They are what you call hachure lines which are drawn on a curve along the edge of the steep incline to show the difference between the level land and the beginning of a slope, such as going down into the stream. The hachuring was put on the side where the slope is.

Q. I will ask you whether on this map, which is Registered Map No. 1259, those hachure lines show a pali beginning at [405] Point X, following through Point K, following through Waiau and up to Point A?

A. The hachuring begins at X and runs to Point K; there is a ridge that runs down to Waiau. It is colored in on the boundary of Kahanui.

Q. Kahanui, Apana 3?

A. Apana 3. That is going through Point A. Then some more hachuring lines, which shows the top edge of the Waialeia Valley.

Q. That is as far as I have asked you about at this point, Mr. Newton.

May I look at Registered Map 1890?

Now, if you will look at Registered Map 1890. I am showing you Registered Map 1890, which is Territory's Exhibit No. 15, Mr. Newton. I will ask you whether this contains hachuring marks similar to those on Territory's Exhibit 11, which is Registered Map 1259, at the points on the northern

(Testimony of H. E. Newton.)

boundary of Kahanui shown as X and K?

A. It does.

Q. Does this map also contain hachuring marks in the neighborhood or coming from Ridge 3539, Grant 3539, Kahanui?

A. Yes, the hachuring lines are on the westerly side of Grant 3539 all the way and also around into Waialeia Valley; it shows hachuring lines and the top is flat. The land itself seems to be flat land.

Q. Are those hachure marks also referred to by surveyors as smudge lines, Mr. Newton?

A. Smudge lines, yes, in a way, but they run differently; instead of lines or a group of lines they have kind of circles, [406] circles showing the different slopes.

Q. Look at your own map, which is Territory's Exhibit 10. I call your attention to the lines immediately adjacent to Points X and K and I will ask you whether those are properly referred to as smudge lines?

A. Yes, sir, those are smudge lines.

Q. And those are to indicate what?

A. To indicate the slope from the higher elevation down towards the stream.

Q. Is the purpose of those smudge lines similar to the hachure marks we have just referred to on the two old maps by Monsarrat?

A. Yes, the same thing.

* * * * *

Q. Did you examine Pease's map of the Ahupuaa of Makanalua and consider it in relationship

(Testimony of H. E. Newton.)

with existing maps of M. D. Monsarrat, which maps are now in evidence in this case? A. Yes.

Q. And ascertain the relationship of the point "Kaulahuki" on Pease's map, if it has any relationship, to the waterfall [407] point marked on your map, Territory's Exhibit 10, as "Waterfall I"?

A. Well, the description made by Pease——

Q. I am referring to the map only at this point.

A. Oh, the map. The upper section of the land——

Q. Of Pease's map?

A. ——of Pease's map was just sketched in up to a peak at the head of Waihanau Valley, and it came back on the other side.

Q. Which is the other side?

A. On the other side of the——on the westerly boundary of Makanalua, by metes and bounds up to Ililika, I believe the point is, on the upper slope of Makanalua Valley, and then it was a general description, "Thence around the edge of the pali to this high peak called Kaulahuki."

Q. Did Pease, both from the easterly and westerly sides of Makanalua, refer to this peak as Kaulahuki? A. Yes. [408]

* * * * *

Q. What I have in mind, once more, Mr. Newton, as far as the map is concerned, realizing that it is only sketched in mauka or south of points Hoalae and Ililika, can you state from your examination of that sketching in whether the point on

(Testimony of H. E. Newton.)

that map at the top called Kaulahuki on the map is below or above the Waterfall I as shown on your map, Territory's Exhibit 10?

A. It is above that, from my map.

Q. It is above that?

A. It is above that, yes.

Q. I show you, Mr. Newton, Territory's Exhibit 8, which is a certified copy of the description of Grant 3539 to R. W. Meyer from the original papers of that grant in the files in the office of the commissioner of public lands of Hawaii, and ask you whether you have examined this photostat or the original of it in the course of your survey work on this boundary problem?

A. This is a description made by J. F. Brown.

Q. I have asked you if you have examined it before?

A. Yes, I have examined it.

Q. I call your attention to the following wording: "That [409] tract of land lying on the top of the ridge between Waihanau and Waialeia Valleys and bounded by the upper edge of the palis of these valleys, the center line of this ridge point described as follows."

I will ask you to go to the blackboard and upon Applicant's Exhibit A, the map, point out the beginning point as shown on this description, if you can do so.

A. The initial point of Grant 3539 is on the north boundary of Grant 3437 to R. W. Meyer, so that we have a point and a boundary line, and that point is also tied up to Kaohu triangulation sta-

(Testimony of H. E. Newton.)

tion given on the map to the initial point, which is a fixed point. It is tied into the triangulation system.

Q. What is the name or designation of that fixed point as shown on Applicant's Exhibit A?

A. The courses are not numbered.

Q. Examine the blueprint.

A. Yes. Except the end of course 24 which is described in the applicant's description, or the beginning of course No. 25. It is the end of course 24 and the beginning of course 25.

Q. Will you state whether that point is identified now on Applicant's Exhibit A?

A. That particular point?

Q. Yes.

A. It is written in there on the map, M. D. M's Ridge A.

Q. And is that or can you state whether that coincides or is identical with the beginning point in the courses given in this description of Grant 3539, Territory's Exhibit 8?

A. Yes, it would be identical. [410]

Q. Yes. Now, reading that description from its beginning point, the beginning of the first course, to the conclusion of it, is any portion of Waihanau Valley included in the lands conveyed by that Grant 3539?

A. Not in the grant. Of course, it may be a narrow strip on the top there. They may be entitled to a strip of land along the top ridge itself to where the pali starts.

(Testimony of H. E. Newton.)

Q. Examine this map, Applicant's Exhibit A. Would that strip of land at the top, which you have referred to as the top ridge, include any portion of Waihanau Valley?

A. Well, it would not include any up to the pali itself, the top of the pali.

* * * * *

Q. (By Mr. Flynn): I will call your attention, Mr. Newton, to the map accompanying and forming a part of the description by J. F. Brown, entitled, "Description of portion of the Government land, Kahanui, Molokai," being Territory's Exhibit 8, and ask you whether you find any definition of the edge of pali on that land—in that map? [411]

A. Yes. It is written right on the face of the map, on both sides, on the easterly side and on the westerly side of the ridge, the spur itself.

Q. I will ask you to trace now the definition of "edge of the pali" from the north to the south, that is, from makai to mauka, and ask you to state where or to what point the line designating the edge of the pali terminates?

A. The edge of the pali on the westerly side terminates at the edge of the Waihanau Valley and on the easterly side of the grant it terminates at the westerly edge of Waialeia Valley and extends up as far as the north boundary of Grant 3437.

Q. Now, from an examination of the map accompanying or a part of Territory's Exhibit 8, can you state whether the point you have just shown as the mauka or southerly termination of that ridge

(Testimony of H. E. Newton.)

of land is identical with the point shown on Applicant's Exhibit A as "M. D. M's Ridge A"?

A. Yes, it is the same point.

Q. That is what I am asking you.

A. Yes, that is the same point. M. D. M's Ridge Point A.

Q. Mr. Newton, examining further this map accompanying and forming a part of Territory's Exhibit 8, is the southerly or mauka boundary of Waihanau Valley clearly defined? A. Yes.

Q. Will you state where that southerly or mauka boundary of Waihanau Valley is with relation to the line you have previously drawn in green pencil on Applicant's Exhibit A?

A. That line is on the northerly boundary of Grant 3437. It is determined by M. D. Monsarrat practically on the line [412] I have determined by my survey.

Q. I will ask you this, then. Is there a substantial correspondence or identity between the southern or mauka boundary of Waihanau Valley, as shown on the map in Territory's Exhibit 8, with the line you have drawn in green on Applicant's map, Exhibit A?

A. It would be one and the same line.

* * * * *

Q. (By Mr. Flynn): Now, Mr. Newton, please, we had prior to the recess been examining Territory's Exhibit 8, being the description and the map of Grant 3539 of J. F. Brown, description and map by J. F. Brown, and I was just calling your at-

(Testimony of H. E. Newton.)

tention to the Applicant's Exhibit B, which is a photostat of the original grant issued to R. W. Meyer. I will ask you now whether the southern or mauka boundary of Waihanau Valley as shown on Territory's Exhibit 8 compares or corresponds with the southern or mauka boundary of Waihanau Valley as shown on Applicant's Exhibit B?

A. The section above Waihanau Valley corresponds with the sketched plan and Grant 3437.

Q. From examining them in this manner can you tell whether they correspond closely or roughly or how?

A. They seem to be drawn to the same scale, 2,000 feet to the inch.

Q. Would you like to hold the one map much more closely to the next one? Now will you answer that question as to [413] whether they correspond closely or roughly, or how?

A. I would say closely. They correspond closely.

Q. Now I will show you Territory's Exhibit 11, where it shows Kahanui Apana 3 and also where it shows Waihanau Valley, and I will ask you to examine that and then examine the map accompanying the grant, which is Exhibit B, and state whether the southern or mauka boundary of Waihanau Valley as shown on the map, which is Territory's Exhibit 11, compares with that southern boundary of Waihanau Valley as shown on Applicant's Exhibit B, compares or corresponds?

A. They seem to be alike, only they are drawn

(Testimony of H. E. Newton.)

on a different scale, one is slightly larger than the other.

Q. Now, I will show you Territory's Exhibit 12, which is the map and survey by M. D. Monsarrat of 1886, and call your attention to the southern boundary of Waihanau Valley on that map and ask you how it compares or corresponds with the southern boundary of Waihanau Valley as shown on the map which is part of Grant 3437, Exhibit B of the applicant?

A. They seem to correspond with each other; as I say, only one is a little larger scale than the other.

Q. Yes. Now, I will show you Territory's Exhibit 13, which is the working sheet of M. D. Monsarrat, surveyor, at a scale of 2,000 feet to the inch, showing the stamped date with Monsarrat's stamp, September 20, 1886, and call your attention to the southern boundary of Waihanau Valley as shown on this map, Exhibit 13 for the Territory, and ask you whether that southern boundary corresponds to the southern boundary of Waihanau Valley as shown on Applicant's Exhibit B, Grant 3437, the map connected therewith? [414]

A. They seem to correspond with each other.

Q. Can you state whether the seeming correspondence is close or approximate or rough?

A. As close as you can scale it. Very close, I would say.

Q. Now, I will show you Territory's Exhibit 14, which is the map and survey by M. D. Monsarrat bearing date 1886, on a scale of 2,000 feet to the

(Testimony of H. E. Newton.)

inch, and call your attention to the southern boundary of Waihanau Valley. And we will have to get the original map once again to examine this properly. And I will ask you whether the southern boundary of Waihanau Valley shown on the map, which is Territory's Exhibit 14, compares with the southern boundary of Waihanau Valley as shown on the map incorporated in Grant 3437, which is Applicant's Exhibit B?

A. They seem to correspond with each other.

Q. Is the seeming correspondence approximate or rough or close?

A. Close. They are both on the same scale and they seem to be identical.

* * * * *

[415]

Q. (By Mr. Flynn): Mr. Newton, will you step up to this board, please? I show you Applicant's Exhibit M, which is a blueprint of the Land Court map and description filed with the application, and call your attention to Grant 3437 to R. W. Meyer, Kahanui 3. Now, you have stated that you have examined this grant before and that you have also examined Grant 3539 and that you have examined many of the letters between the parties at the time when the issuance of the grants and many of the documents on record in your own survey department of the Territory concerning these grants. I will ask you to draw in red pencil on this blueprint the northern boundary of Kahanui 3 where it joins the southern boundary of Waihanau Valley, if you can do so from your examination of this blueprint?

(Testimony of H. E. Newton.)

A. Kahanui is in two parts here.

Q. Yes, but first I am asking you to draw the——

A. Described in Grant 3437?

Q. Yes. A. It begins at——

Q. I ask you only for the northern boundary, which is the southern boundary of Waihanau Valley.

(Witness draws boundary between Waihanau Valley and Kahanui 3.) [423]

Q. (By Mr. Flynn): Now, from the way you have indicated the boundary between Waihanau Valley and Kahanui 3, Mr. Newton, it appears that Grant 3539 joins Kahanui 3 at only one point, which we have previously referred to as Point 1 and which is referred to or demonstrated on this blueprint map, Exhibit M, by the word “pipe” just under the circled number 24. Is that correct?

A. Yes, that is correct.

Q. From your examination of this grant——

Mr. Cass: If the Court please, may I interrupt? If the Court please, I am not objecting to the marking of these maps. It has been done before in the other maps, and of course this is all opinion testimony of this witness, it is not factual in any way, but I am not objecting to the marking of the maps, according to his opinion, and agree to have the opinion before the Court for what it is worth.

The Court: Proceed.

Q. (By Mr. Flynn): I was referring, Mr. Newton, to your knowledge of these grants from an

(Testimony of H. E. Newton.)

examination of them and various letters and documents pertaining to them and including your own survey work to determine the boundary between Kahanui 3 and Waihanau Valley. I will now ask you whether Grant 3539 to R. W. Meyer is on a portion or any portion of Grant 3437?

A. No. Not at all. No.

Q. I will call your attention to the wording in the area shown on this map, Applicant's Exhibit M, within the ridge boundaries of Grant 3539 to R. W. Meyer, the words to which I will call your attention are "Grant 3437." Is it correct [424] to place those words "Grant 3437" within the same area shown to be Grant 3539?

A. No. The Grant 3539 is only on the spur ridge and does not include any portion of Grant 3437.

Q. Grant 3539 was a wholly separate grant, Mr. Newton?

A. Yes, sir.

* * * * *

Q. (By Mr. Flynn): Calling your attention, Mr. Newton, to your own map, which is Territory's Exhibit 10, I will ask you what was your purpose in plotting the points marked with a green pencil on the spur ridge Grant 3539?

A. Those were points on the edge of the ridge which Monsarrat had located from his survey of Kalaupapa there and he had flags at these different points along the edge of the ridge, which he sighted on from stations below. [425]

Q. And from field books 7 and 8 of Monsarrat you have made those plottings, have you not?

(Testimony of H. E. Newton.)

A. Yes.

* * * * *

Q. (By Mr. Flynn): Yes. Mr. Newton, if you will step over here now, I will show you Territory's Exhibit 15, which is the working sheet of M. D. Monsarrat, surveyor, scale 1,000 feet to the inch, 1895, and calling your attention to the area marked "Waihanau Valley" immediately to the north of the word "Waiau" shown here to be on the northern boundary of Waihanau, Grant 3437 to Meyer, this being dated 1895, can you state whether the field note work of Monsarrat shown by books 7 and 8 bearing dates 1894 and 1895 appear to have been incorporated into this map? A. Yes.

Q. And will you state whether the extreme mauka or southern boundary of Waihanau Valley, where it joins Kahanui, Grant 3437, was in 1895 placed by Monsarrat substantially where it was shown in the other maps done in 1886? [426]

A. Yes.

Q. Mr. Newton, I will show you Territory's Exhibit 3 for Identification, which contains a tracing marked "Kahanui 1048 acres" all in pencil, on which some lines have been superimposed in blue and in red pencil, and ask you whether the tracing itself was made by you or under your direction in the survey department?

A. Yes; I remember that.

Q. May I see Exhibit B, please? I will lay the tracing over the map incorporated in Grant 3437,

(Testimony of H. E. Newton.)

and ask you if this tracing appears to be one of this map in the grant?

A. The pencil line agrees with the map itself, with the sketch plan.

Mr. Flynn: May I see Territory's Exhibit 11 and 12, please? And 13 and 14, Mr. Clerk, please.

Q. (By Mr. Flynn): I will show you Territory's Exhibit 13, Mr. Newton, which is a working sheet map by M. D. Monsarrat, surveyor, on a scale of 2,000 feet to the inch, bearing stamp date 1886, and holding the tracing over that portion of this map, which is Territory's Exhibit 13, and I will ask you if the boundaries shown on the tracing correspond to those on the map?

A. They do.

Q. Between points known to you as X and A, is the correspondence close or precise?

A. It is very close.

Q. Is it substantially identical?

A. Yes, sir.

Q. Very well. Now, I will follow the same step with [427] regard to Territory's Exhibit 14, which is the map and survey by M. D. Monsarrat, scale of 2,000 feet to the inch, bearing date 1886, and ask you whether the boundaries shown in the tracing correspond to those of Kahanui Apana 3 as shown on the map?

A. The map does not show the entire grant itself, but what is shown on the photostat is fairly consistent.

Q. Between points we have previously referred

(Testimony of H. E. Newton.)

to as X and A, is the correspondence very close or precise? A. Practically precise.

Mr. Flynn: Thank you; I will offer Exhibit 3 for Identification in evidence.

* * * * *

The Court: Let the tracing become Territory's Exhibit 3 in evidence.

(The tracing referred to was received in evidence as Territory's Exhibit 3.)

Mr. Flynn: I offer Territory's Exhibit No. 4, the photostat reduction of the map of Mr. McKeague, which is Applicant's Exhibit M, and which map Applicant's Exhibit M is a blueprint.

* * * * *

[428]

The Court: It will become Territory's Exhibit 4 in evidence.

(The photostat reduction of map, referred to above, was received in evidence as Territory's Exhibit 4.)

* * * * *

Q. (By Mr. Flynn): Mr. Newton, I will show you Territory's Exhibits 5-A, B, and C, for Identification, and ask you whether you have previously examined these photographs? A. Yes, I have.

Q. I will ask you whether you can identify them or state what lands they cover? This is A, this is B, this is C.

A. These photographs of the spur ridge, which

(Testimony of H. E. Newton.)

are parts of Kahanui lands, the lands of Kahanui which are covered by Grant 3437 and 3539.

Q. Does Waihanau Valley area show in any of these pictures? A. Yes. [429]

Q. You can identify it in the second picture, which is Territory's Exhibit 5-B for Identification?

A. Yes, I can see the ridge and stream. I know it is about where that is on the map.

Q. Can you see any ridges we have referred to as transverse or overlapping ridges? A. Yes.

Mr. Flynn: I will offer these as Territory's Exhibits 5-A, B, and C.

Mr. Cass: No objection.

The Court: They will become Territory's Exhibits 5-A, 5-B, and 5-C, the three photostats mounted on plastic, reading left to right, A, B, and C, respectively, in evidence.

(The three photographs mounted on plastic were received in evidence as Territory's Exhibits 5-A, 5-B, and 5-C.)

* * * * *

[430]

Mr. Flynn: I have here a photostat reduction of the map of which Applicant's Exhibit M is a blueprint, this reduction being to a scale of 2,000 feet to the inch, the previous one—or rather to a scale of 1,000 feet to the inch, the previous one having been 2,000 feet to the inch. I will show it to counsel.

Mr. Cass: We have no objection to its admission.

(Testimony of H. E. Newton.)

The Court: It will become Territory's Exhibit 20 in evidence.

(The document referred to was received in evidence as Territory's Exhibit 20.)

Q. (By Mr. Flynn): Mr. Newton, examining the Applicant's Exhibit B, which is Grant 3437, I call your attention to the map incorporated in this grant and will ask you if you can locate in the area of the map the approximate location of the Big Fall which has previously been referred to as Waihanau Falls and also as Kaulahuki?

A. It is just below the north boundary of this grant. It would be about where the letter "e" in the word "Valley", I believe.

Q. The letter "y" of the word "valley" then would be mauka or southerly of the Waihanau Falls, is that correct?

A. Very close to the "e" in the "valley"; right in that vicinity there.

* * * * *

[432]

Cross-Examination

Q. (By Mr. Cass): Mr. Newton, the Applicant's Exhibit A, now on the board up there, contains a number of lines and other symbols which appear on other maps. Are these lines and symbols lines on which part of the technical description of boundaries and so forth—I refer to this line here of a dash and two dots—is that the technical way of denoting a surveyed boundary?

(Testimony of H. E. Newton.)

A. Yes, that is.

Q. Then I take it wherever that line appears on this map there is some evidence somewhere of an actual survey on the ground, or it is supposed to be so indicated?

A. Well, if they are running out of a boundary that would indicate what it meant.

* * * * *

[433]

Q. Now, these dotted lines here, apparently between stations, are for showing directions?

A. You mean the dash-dotted line?

Q. No. Just the little dots.

A. The dotted line shows a direct line between two points.

Q. It is not intended as a boundary line?

A. No, not the boundary line. The dash and two dots represent the boundary line.

* * * * *

Q. In taking Monsarrat's survey of 1885, this boundary here then, I take it, you have checked to determine whether or not these monuments, distances and directions are the same as appear in that survey notebook? I am speaking now of this southerly boundary and the—southerly and the westerly boundary, the bottom lines.

A. I don't know whether that is absolutely correct, but these are the courses that are given in the grant itself.

Q. And those courses are taken from what?

A. By Monsarrat, the description of Kahanui.

Q. Have you got any survey book of Monsar-

(Testimony of H. E. Newton.)

rat's at or about the time of this grant that shows a different survey or a separate survey made by him of this southerly line—these bottom lines?

* * * * *

[434]

A. Not necessarily. It may be on the boundary, on hills or other vantage points.

Q. At a station it is customary to put some sort of monument, either a flag or some other object, to relocate the station, is it not? [435]

A. Yes.

Q. Now, the next column is "Object," and the object is what you sight. Do the objects you sight at necessarily imply that they are on a boundary?

A. No.

Q. Are those objects marked with a flag station always or might they be any natural object that could be picked up from an instrument?

A. It all depends on what you are actually doing. It may be just some object the station, or for some work they would probably flag the points that they want to locate.

Q. This is my impression. Correct me if I am wrong. That when the surveyor sets up his instrument at a station he takes a sight to various objects, first for the purpose of relocating that station in the event that is necessary, and second for the purpose of triangulating objects which may be used later in the survey to locate the entire line over which he is going, or for some other purpose. Is that right?

(Testimony of H. E. Newton.)

A. Well, while he is doing that, that is what he would do.

Q. Every time he would set up he would shoot permanent objects, monuments if possible, from which some surveyor if going back to those objects or monuments could shoot back and locate reasonably accurately the position of that station on the ground?

A. Yes. That is why they have these triangulation stations. Somewhere to start from.

Q. The next column is headed—I cannot make out exactly what that is; apparently it is an A——

A. “Az”. for azimuth. [436]

Q. Azimuth. That is the reading taken from the instrument at the station of each object named, is it not?

A. Yes.

Q. “Dist.” in the next column means distance?

A. Distance.

Q. That is not necessarily filled in?

A. Of course, if you are sighting at flags, they may be distant points, but the close points are generally taped by a rod that is used.

Q. The next is “Angle.” What is the angle?

A. The actual angle that you obtain by sighting at one point and then to the second point. You can get that angle in between the two points.

* * * * *

[437]

Mr. Cass: Admittedly, this has nothing at all to do with the maps in issue up here, and I am using these pages purposely so that the general explanation may not be warped or biased either by myself

(Testimony of H. E. Newton.)

or anyone else in regards to that opinion testimony.

* * * * *

Q. And that page is cross-lined and contains a sketch. Where would that sketch be from?

A. Well, it is just a flat sketch; he sketches as he goes along with his work. [439]

Q. Whatever he thought, made at the time, to identify his work, he would sketch in at that time?

A. That would be a guide when he made his map, to kind of picture the area.

Q. And it would be the guide when he made his map?

A. Yes.

Q. These triangles with dotted lines are what?

A. Triangulation stations.

Q. Here is an entry "Rock S"; that would be a description on a map?

A. No, no; it is just a point, a sub-station.

* * * * *

Q. Some of these points are triangles with a dot in. What does that mean?

A. Triangulation station.

Q. And the circle with a dot means what?

A. Generally a sub-station.

Q. Each one of these points, or with very few exceptions, is followed by either a triangle or a dot or a circle with a dot, some of them followed by a circle and a dot. Would that be something marked on the ground by him or something simply picked up and sighted to?

A. Both. If he puts in no station there he can occupy, he puts in his own station, probably a

(Testimony of H. E. Newton.)

spike or a wooden peg or something, or a cross on rock or something.

* * * * *

[440]

Q. Now, on page 16 of this book is a sketch showing pencil lines drawn in. What does the solid pencil line mean; is it a boundary line?

A. The lines drawn in between these two stations, and when they do that they are getting a base line; this sketch shows he was trying to get a point across a gulch, using these two bases to figure out his distance to the point on the other side of the gulch.

Q. The dotted lines mean merely sights?

A. Sights to the station on the opposite side of the gulch.

Q. But the solid lines mean the accurately measured distance?

A. Yes, for a base.

Q. For a base between two stations?

A. Yes.

Q. On page 14 is a straight line between stations, with apparently five stations indicated. Taking the survey itself and the data on this side, would you say that those straight [441] lines indicate a boundary?

A. Oh, it doesn't say. If he was running a boundary line he would probably have the name of the land. Generally he used simply the dash and two dots for a boundary line.

Q. Did he in his book ever put the dash and two dots on the boundary lines?

A. I don't know.

(Testimony of H. E. Newton.)

Q. On page 48 are straight lines. Apparently from stations. This is the seacoast, as I understand it?

A. Yes.

Q. Marked "sea"? A. Yes.

Q. Stations on the seacoast or near the seacoast have straight lines running up with Kamiloloa, Government, or konahiki?

A. Konahiki, yes.

Q. Kamiloloa Government and Paakea. Do those lines represent the division or boundary lines between those parcels?

A. Yes. It shows that he showed the adjoining lands and these lines in between are the boundary lines.

* * * * *

Q. (By Mr. Cass): Now, referring again to Exhibit A.

* * * * *

[442]

Mr. Flynn: May I ask that the record show that the map, the source of all this discussion, is Applicant's Exhibit A?

The Court: Proceed.

Q. (By Mr. Cass): That is my understanding of these marks on this map and any surveyor would interpret them that way.

A. Well, that was the idea.

* * * * *

[443]

Q. In determining the edge of a pali in surveying, will it be likely that two surveyors, one working from the top of the pali and traversing what he conceived to be the edge, would make the same boundary of the land as one working from the bot-

(Testimony of H. E. Newton.)

tom of, say, a thousand foot pali and looking up?

A. Generally in a country like that, where land is fifty cents an acre, they generally take just a few shots along the top edge of the pali or flag and cut in.

Q. But if the pali drops off sharply and slopes less sharply back several hundred feet, the man on top might take the edge of the pali where it was less sharp and the man working below would take where there was an abrupt drop, isn't that right, according to what he could see?

A. It is up to the surveyor doing the work.

* * * * *

[445]

Q. (By Mr. Cass): Now, this map, referring to Registered Map No. 1259, Exhibit 11, which is labeled "Working sheet, W. D. Alexander, superintendent; M. D. Monsarrat, dated September 17, 1886" on the face of the map, this map contains the lands of Kalawao, Palaaau, Naiwa, Kahanui, Kalamaula, Kaunakakai, Pupukeyo, and Kamiloloa, together with other lands. Can you say whether or not all these lands on this map were surveyed in 1886 or 1885?

A. The map is dated 1886 and the field book may be a little earlier.

Q. The field book may be earlier? A. Yes.

Q. This is only part of Molokai, the center section, apparently, and it contains—do you know whether or not this is the first map or sketch that portrays Kahanui 3, later granted as Grant 3437?

A. I am not sure whether that is the first map

(Testimony of H. E. Newton.)

or not. It cannot be very far off. It may be No. 2, I don't know.

Q. Now, inviting your attention to the southerly and westerly boundaries of Kahanui 3, as it appears on this map, that boundary is marked with a dash and two dots. What does that indicate?

A. That is simply for the boundary line.

Q. All right. Now, is that simply for a surveyor's boundary line?

A. Well, the boundary line. Sometimes they are not even surveyed, the boundary lines.

Q. Do you know who actually did the draftsman's work on this map? [446]

A. The working sheet is generally, on a job like this it takes months and sometimes years, a couple of years, and the drafting work is done right where you are doing your work. It is a progressive map. You do your field work and then you come back and probably take a week or so off and fill in your field notes and go out again when it is good days for the field work, and on the rainy days you stay in and do your office work.

Q. That is the general custom? A. Yes.

Q. But as to this particular map, do you know whether Monsarrat came back from Molokai and entered the surveys of these various lands himself by drafting them on the land?

A. Yes. Those are Monsarrat's printing.

Q. That is his printing. Is the "land of Kahanui" his printing? A. It could be.

(Testimony of H. E. Newton.)

Q. Is the word "Grant 3437 Meyer" his printing?

A. No. That came later, after the grant was issued.

Q. But that is not Monsarrat's printing, no matter when it was put on there? A. No.

Q. The word "Waialeia" out here apparently covers an old erasure on the map. Is that printing Monsarrat's printing? It is different letters than the rest of it? A. I believe it is.

Q. The word "Waikolu Valley" up here, is that Monsarrat's? A. I believe so.

Q. Can you tell me any other lands that are on this map [447] where the name of the land is in lower case letters and set in by Monsarrat?

A. I don't get that question.

Q. These are all capital letters, "Kamiloloa Government, Kaunakakai, Kalamaula, Kahanui." Those are all in capitals. Can you tell me why the words "Waialeia Valley, Waihanau Valley, Waikolu Valley" appear in small letters, that is, lower case letters?

A. These are the names of the lands, the ahupuaa or ili, while these are merely the gulches.

Q. Now, I invite your attention to the northern boundary of Kahanui 3, as it appears on this map. There is no dash and two dot lines of that boundary. What does that indicate?

A. This colored line here indicates the limits of Grant 3437 to Meyer in Kahanui, Apana 3.

Q. And what does the lack of the dash and two

(Testimony of H. E. Newton.)

dots on that boundary indicate; that it was not yet surveyed finally?

A. Probably he hadn't written the description; the grant was made later, after the map had been completed.

Q. Was made after the map was completed?

A. I believe the grant was later.

* * * * *

[448]

Q. But this was put in without a dot and dash line sometime after this particular map was made?

A. Yes. He had to have something to base the boundary line on and that was his determination of the boundary of Kahanui Apana 3.

Q. And you say you have no knowledge of any survey that Mr. Monsarrat may have then made except the survey he made when he was determining this boundary marked with dots and dashes on the south and west line of this?

A. The correspondence shows that there was a lele in there that was not surveyed and they wanted him to make the survey.

Q. Do you know whether that has any indication that he was ever on the ground to make the survey?

A. He actually—his field notes show where he took actual sights to all points.

Q. That is his field notes of the survey of this lower line here. I am speaking about this undotted smudge line that runs on the northern and westerly boundary of this land. Is there anything in the field

(Testimony of H. E. Newton.)

notes that shows he ever was on the land in connection with that?

A. He had a habit of putting flags——

Q. I am speaking about——

A. That is what he said; he was setting flags with his kamaainas on a different part of that land, and he had found and discovered there was a piece up in here, and he was taking some Hawaiian kamaainas up to show them the piece.

* * * * *

[449]

Q. That is the first letter to Alexander. His having discovered a piece of land lying on the edge of the valley, part of the Ahupuaa of Kahanui. May 27, 1885. This has nothing to do with it. The next letter, I believe.

Mr. Flynn: July 31.

Mr. Cass: That has to do with the survey of lower Kahanui. Now, here is the letter of July 17, 1885.

Q. (By Mr. Cass): I invite your attention to the underlined portion of this. "Yesterday I was mauka of Meyer's with kamaainas on the boundary of Ilole." Where is Ilole? Indicate on the map the area of Ilole, Kahanui, and Kalamaula. Kalamula is over here.

"I had to go to Pukoo to get a kamaaina."

Pukoo is a way off and practically across the country straight across from Kahanui, is it not?

A. About half way over to Halawa. That would be about the east end of the island, about in the middle of the island.

(Testimony of H. E. Newton.)

Q. "And yesterday the kamaainas showed me a piece of Kahanui a way mauka, on the edge of the palis." Now, in the letter of July 31, 1885 to Alexander, and, by the way, these letters are all in the Archives or from the records of the Government, are they not? A. Yes.

Q. Reading. "I enclose a rough sketch of the lands that I am now working on so as to give you a little idea of the way they are mixed up."

Have you got that sketch?

A. I don't remember. What sketch do you mean?

Q. The one mentioned there. A rough sketch of the land he was working on. Probably it is down here.

And further in the letter: "I show on the sketch the piece of Kahanui that I spoke to you about. It is part of the land belonging to government and konohiki, but the konohiki portion has been awarded by survey and this piece is left out."

Have you got that sketch?

A. I don't know what sketch you are referring to.

Q. I am referring to the one mentioned in that letter. The letter has an enclosure. Have you got the enclosure?

A. No. In fact, he wouldn't know because he had no survey of it.

Q. He wouldn't have to have a survey of it if he sketched what the kamaainas told him what the boundaries were.

A. But he would have to make a survey before

(Testimony of H. E. Newton.)

he could get proper boundaries for the ili itself.

Q. Let me understand that, Mr. Newton. That he had to have a survey on the ground to determine, to lay off the boundaries of this land, before he could determine the boundaries?

A. He had kamaainas. From his letter he had kamaainas who said that there was a lele of Kahanui up in this vicinity there, and he was going to get some kamaainas. He had to go somewhere to get some kamaainas to show him where this particular land was.

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[451]

Q. A few days later he said, "I show you a sketch of the land I spoke to you about." That is the land of Kahanui that had been shown him by those kamaainas. That sketch would contain, would it not, the information that he had received from the kamaainas as to the boundary, the land markers, roughly where those land markers lay?

A. They just say, "This is a piece of Kahanui and this was down to the gulch," in the general description. They would not go around if they were passing by. They would have to go and get instruments.

Q. That is the only record we have of kamaainas ever telling Monsarrat, as far as you know, anything about this land. Do you mean the whole boundary of this land was based upon just a casual conversation while he was engaged in another survey?

A. These boundaries of Kahanui would really

(Testimony of H. E. Newton.)

depend on the determination of the boundaries of the adjacent lands.

Q. The lower boundary, yes.

A. Where they have already been awarded.

Q. Yes.

A. Then the only remaining part would be gulch, which would be the natural boundary, and the edge of the pali.

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[452]

Mr. Cass: I am cross-examining on an exhibit of the Government which was studied by this witness, and that sketch was mentioned. I want to know about that sketch, what facilities he had at the time to make such a sketch.

The Court: The subject of the sketch is referred to in one of the exhibits, which opens it up to cross-examination. The nature of this question, in fact, the exact words were, "How would he do it if he did it?" If this witness knows, [453] he is a qualified surveyor, and if he knows, he may answer the question. If you don't know and have no idea, say so, Mr. Newton.

A. I think I have some idea. That they had kamaainas for the boundaries of the land of Kamiloloa, which would establish the southerly side, the southerly boundary of this land of Kahanui. Thence along the southwest boundary, we already have the fixed boundaries of the land of Kaunakakai and Kalamaula down to Points X and Y near Kaohu station. Now, the land that is in question is easterly of that, on the top of the pali. The Wai-

(Testimony of H. E. Newton.)

kolu Valley and the Waialeia Valley. The south-westerly boundary has already been determined and all he had to do was to make a survey of the location of the edge of the pali.

Q. (By Mr. Cass): I note on this map in pencil the word "Waiau." Does that word "Waiau" appear in any part of the survey of this land or the field books of Monsarrat concerning this land?

A. Monsarrat showed it in his field book, yes. There is a waterfall or swimming pool.

Q. Will you show me?

A. It shows "Waiau" there (indicating).

Q. Will you show me?

A. It has the word "Waiau" on it.

Q. From which point did he give you that; can you give me the word?

A. On his sketch plan he has it.

Q. On the sketch plan?

A. In his field notes somewhere. I don't know just [454] where.

* * * * *

Q. (By Mr. Cass): Run through the description here and see if you can find the word "Waiau" any place in the blueprint.

Mr. Flynn: Let me see this, please. It is not in evidence.

Mr. Cass: Let me have the other one, please.

Q. (By Mr. Cass): Here is the photostat which picks out the pages. Find where "Waiau" is mentioned in those pages, please, and if it is mentioned, where it is located.

(Testimony of H. E. Newton.)

A. It is on page 112 of Field Book 359. Monsarrat has a sketch of the land of Kahanui and just below Point A he has, at the bottom of the valley, of the stream there, he has the word "Fall" indicated in red in the sketch. It does not say "Waiau Fall", but he says, shows a fall there. Just where it crosses the boundary, sketched as crossing the stream. That is, there was a waterfall there at least. It proves to me that the result of Monsarrat's work, he put it in as Waiau Falls, where it crosses the stream. His map shows that.

Q. It does not show in his field book at any location? A. I do not find it here.

Q. And if you cannot find it, it is not there. As I understand it, this map starts below and this survey includes these particular lines and these lands. When the next surveying job was done these were all resurveyed in here, or was the next section just put on to the end of this map?

A. I believe a new map was made altogether of the other [455] section.

Q. But the new map was simply a copy of the section already in?

A. Yes. The adjacent boundary of the land would be shown on the second map.

Q. The adjacent boundaries are shown, but the work is unchanged. For instance, the boundaries of Kamiloloa, if they are shown on a compiled map of the whole island of Molokai, would be taken right off of this map and scaled to the scale of the new map?

A. Generally, yes.

(Testimony of H. E. Newton.)

Q. There would be no resurvey of the lands of Kamiloloa for the purpose of making a completed map of another job?

A. No, unless it was necessary to get a little more additional information.

Q. But that is the general practice, is it not, you make a survey of one section, complete the map, make a survey of the next section, complete the map, and continue on until you have the complete map of Molokai, or of some other island, and then the whole is one complete map, which is then based actually on copies of the previous maps. Isn't that correct?

A. Yes. The island map would just show the large lands, not the small areas.

Q. But whatever would be shown on the large maps would be taken off of the other maps?

A. Yes.

Q. So that in this series of maps that the Government has offered, the land of Kahanui, as shown here, has been recopied from the same sketches that appear in the previous maps, [456] simply to complete the map, isn't that true?

A. It is based on previous maps.

Q. Yes. So that if a tracing follows the lines of this work sheet here, the same tracing will follow the lines on these other Government maps as long as there is no resurvey of Kahanui?

A. That is the idea.

Q. Yes. In other words, as far as Kahanui is concerned, there is one map here, it has been copied

(Testimony of H. E. Newton.)

into other maps from the authority of this sketch or this map? A. Based on Monsarrat's map.

Q. All of them?

A. They are all Monsarrat's.

Q. So that actually as the survey and the map of Kahanui, there has been one map copied into a number of different maps of various areas, including Kahanui, but just the one survey and one map of Kahanui has been used in the copying?

A. That is my belief. I am not positive but that is my belief.

Q. The authority then for each map for the boundaries is the authority for the first map that was made?

A. The boundaries are defined on two sides and the easterly and the northerly boundaries are also indicated as running along the pali lands.

Q. It is definite in that the boundary follows the natural monument or pali? A. Yes.

Q. But as to the location of those palis on the ground, it is indefinite, isn't that true? [457]

A. It did not take every angle on the edge of the pali. You have them scattered so that you do not have every peak in there. Land at fifty cents an acre.

Q. This is an overlay of the Government's map on a reduction to the same scale of the surveyed maps?

Mr. Flynn: May I interrupt, please? The overlay is taken from the grant and the map on the grant and the evidence so shows. Counsel has re-

(Testimony of H. E. Newton.)

ferred to the Government map. That is not accurate.

Q. (By Mr. Cass): You compared this overlay with the Government map of the same scale and found it practically identical, did you not?

A. Yes, according to Monsarrat's map there, it was practically identical.

Q. You also overlaid it on the sketch attached to the grant and found it identical or practically so?

A. As I said, along the gulch, along Waikolu and Waialeia Valleys the surveyor did not locate all the little angles along the top of the pali. It was more of a sketch but it took in all the land from the fixed boundaries over to Waialeia Valley and Waikolu Valley. Modern surveying has taken in all the little angles which gives it a different shape altogether.

Q. Do I understand, Mr. Newton, then, that this northern and westerly boundary is a sketched boundary and not a surveyed boundary of that sketch?

A. Monsarrat did locate certain points along the top edge of the pali but he did not have enough.

Q. When? [458]

A. When he was down in the valley.

Q. He had not located them in 1888, had he?

A. I don't know.

* * * * *

Q. On that overlay, upon the first approximately 2,000 feet of this overlay the Government line there is approximately 500 feet out, isn't it?

(Testimony of H. E. Newton.)

A. It is possible.

Q. From the line that you yourself determined to be the edge of the pali?

A. As I say, I did not locate anything in Kahanui.

Q. No. But here is your lower sketch or your map, Exhibit 10. It shows a line of the edge of the pali, the lower edge, where it is lettered in "Kahanui Grant 3437 to R. W. Meyer." It [459] varies from the overlay by at least 500 feet?

A. That portion from above the word "Kahanui" there, "Grant 3437 to R. W. Meyer", that was just taken off of Monsarrat's map. The one we are on, to Waikolu Valley, I had nothing really, no location of my own there.

Q. But the first line of Monsarrat's map, for the first 2,000 feet starting from cross on rock, Point X, on your map is there an overlap anywhere from 500 to a thousand feet? In error, is it not?

A. Which one? Point X here?

Q. Yes.

A. No, no. It starts right at the same point. No.

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[460]

Q. Here is a red pencil. You can make a dotted line for that so that it will show up. If you will refer back to the tracing so that you can say, without reference to the topographical features, where the line is supposed to run, superimposed on this map. That is what I want. I don't want the topographic description of the line but where that line itself would run.

(Testimony of H. E. Newton.)

A. You mean Monsarrat's line?

Q. The line that is on this Government map.

A. Yes.

Q. Yes.

A. I will say at this time, first, that I located nearly every angle in the top of pali where Monsarrat just took a few sights, so mine is an irregular line and Monsarrat has a curved line to the edge of the pali, so his line would be a curved line.

Q. Just line it in, please.

A. It begins at Point X, at the northwest corner of the land of Kahanui, Grant 3437 to R. W. Meyer.

Q. I invite your attention to the shape of the Government's map there, that is, this line here, and ask you whether the line that you have drawn follows the shape of that—of the [461] Government's line here?

A. It is the same. I mean fairly close.

Q. In your opinion, then, what you have drawn on that map is fairly close to the Government's original line here?

A. Yes. Monsarrat's survey.

Q. I am not talking about Monsarrat; I am talking about the one that is on the map.

A. Yes. Well, Monsarrat made the Government survey map.

Q. And that, to the best of your ability, is a representation of the Government's map?

A. Yes, up as far as the ridge point.

Q. As far as the ridge point?

A. Yes.

(Testimony of H. E. Newton.)

Q. That is enough. Now, may I have the next map in point of age?

Mr. Flynn: Exhibit 12, No. 1260.

Q. (By Mr. Cass): Now, on the outside this is marked "No. 2, Molokai, central, reg. 1260."

A. Yes, sir.

Q. "1 to 12,000." Now, Mr. Newton, in relation to the last map we had up here, which was the work sheet, what does this map represent?

A. This map represents the middle section of Molokai, map and survey by M. D. Monsarrat in 1886, 1 inch equals 1,000 feet.

Q. Then, as I understand it, this is a completed map?

A. And it is registered map No. 1260.

Q. Yes. And, as I understand it, this map, then, is the completed map of which the other was a work sheet? [462]

A. Yes. This is on the same scale.

Q. Can you tell me from what survey or surveys this map was compiled; would it be the same survey as the work sheet?

A. Yes, probably with a few additions.

Q. Yes. This map is dated 1886. How come Grant 3539 to Meyer appears on the summit of the ridge when that grant was not granted until two or three or four years later?

A. Our maps are kind of progressive maps. After these lands are granted and the Government has no more interest in that particular piece, they insert the title.

(Testimony of H. E. Newton.)

Q. They insert the title. Do they insert anything else?

A. The area, the grant, and the grantee.

Q. Do they insert additional topographic features?

A. Yes. Anything new like a pipe line, for instance. That has been added on. The pipe line which is shown in blue is added on to the map.

Q. When was that pipe line added on to the map?

A. I don't see the date there.

* * * * *

[463]

Q. Do you remember about when that was put in?

A. I don't know.

Q. You don't know?

A. I haven't made many trips to Molokai. If I were to look up the records I could find out.

Q. That appears on the documents?

A. But I haven't looked at the records.

The Clerk: Exhibit 5-A, B, and C.

Mr. Cass: That appears on Exhibit 5-C.

A. I wouldn't know.

Q. (By Mr. Cass): It appears in the lower right-hand corner of Exhibit 5-C?

A. I would not know anything about it because I am not too familiar with that section.

Q. Now, in connection with this map, have you any record of an additional survey made by any person by which this dash and two dot line was put on the northern and westerly boundaries of the land sketched in. There is no such mark on the work sheet.

(Testimony of H. E. Newton.)

A. I don't think there has been any other surveying outside of Monsarrat's, which map shows on some of the other Government maps, but it seems to me that this Land Court survey is about the first complete survey of that area.

Q. That is, actually following the line on the ground?

A. That is a more accurate survey of the edge of the pali.

Q. You don't know that this boundary here does accurately follow the line on the ground?

A. No, I don't. In fact, the top of the pali, the edge of the pali is the boundary. [464]

Q. Somewhere along in there the boundary runs?

A. Yes.

Q. It follows the natural monument, the edge of the pali?

A. Yes.

Q. And the monument controls?

A. Yes.

Q. That is, as I understand it, the monument controls. There has been no substantial change in the shape of Kahanui on this map from that in the work sheet?

A. No. They have been practically done within a year or two of each other.

Q. One is practically a copy of the other or it should be a copy of the other?

A. An exact copy with additions probably.

Q. If there is any addition there would be some surveyor's note to show the reason for the addition, would there?

A. They generally put that in blue or something

(Testimony of H. E. Newton.)

like that to indicate something has been added.

Q. You don't see anything of that sort on Kahanui 3?

A. No, but this map came later.

* * * * *

Q. Yes, but no change in the survey appears?

A. No. The boundary remains the same.

Mr. Cass: Now, may I have the next map in point of time?

Q. (By the Court): Mr. Newton, according to the note on the map and the color legend there, the Kahanui area there is one of three pink shades, which the legend designation has either award by survey, award by name or title questionable. Which one would obtain here as to the color? They are faded and shaded, I believe.

A. I believe it is more like Kamiloloa and probably Kahanui Apana 3.

Q. And that, according to the legend, would be on the questionable?

A. Yes, title questionable.

* * * * *

Q. (By Mr. Cass): The coloring would be put on before the lettering. You don't mean that Kahanui section up here, which from your judgment of colors, is in the title questionable class?

A. The date is 1886.

Q. Yes, but it also appears as a grant to Meyer. Then the grant to Meyer was noted after the map was colored.

A. Yes.

Q. Then the shape of this and the coloration of

(Testimony of H. E. Newton.)

that area in there, in your opinion, was noted in the map before any grant was made to Meyer?

A. What?

Q. It was noted before the grant was made to Meyer?

A. You mean the boundaries of the land?

Q. Yes.

A. It was unawarded land so Mr. Meyer—I mean Mr. Monsarrat was making this survey for the first time to determine the boundary.

Q. Then the coloration and the boundaries were on there before the grant was issued to Meyer?

A. What is the date of the grant? [466]

Q. The grant is 1888.

A. It was after the map was made.

Q. The date 1886, does that refer to the survey date or the map date? A. The map date.

Q. Then everything that appears at a date later than 1886 must have been added after the grant or after the map was made? A. Yes.

Q. And in 1886 there had been no survey by traverse of this boundary in here?

A. No. Mr. Monsarrat made that survey.

Q. He made a survey but a survey by traverse had never been made at the time this map——

A. (interrupting): No. Only points were located at certain points along the edge of the pali and a boundary between Kalamaula and Kaunakakai and Kamiloloa.

Q. Yes. But the boundary we are disputing had

(Testimony of H. E. Newton.)

never been surveyed by traverse at the time this map was made?

A. Well, Monsarrat was making the survey then, at the time he was on Molokai, and from his letters to Alexander of the survey department he said that the kamaainas or someone had showed him a piece of unawarded land, being a portion of the land of Kahanui.

Q. That is true. He made a survey of the land. But I am speaking of the survey by traverse, actually the surveyor going out and putting flags and running his instrument and having his chain and cutting brush along this line of the north and westerly boundaries. That had never been done at [467] that time?

A. No. Only the westerly and southerly and the easterly and northerly boundaries were run along the monument of the top of the pali.

Q. They simply were described by monument?

A. Yes, by monument.

Q. There is no pretense at all that this boundary line follows the monument?

A. That was the line that was established by kamaaina evidence and Monsarrat reproduced it on his map.

Q. You mean kamaaina evidence established the line of the palis or told Monsarrat that the line of the palis was the boundary?

A. Yes. The kamaaina evidence told him that the boundary was along about in there. That is why he put it in there.

(Testimony of H. E. Newton.)

Q. In accordance with the description "along the edge of the pali"? A. Yes.

Q. Wherever the edge of the pali run, the kamaainas told him the line run?

A. According to his letters to the office.

Mr. Cass: May I have the next map, please?

* * * * *

The Clerk: Exhibit 14. [468]

Q. (By Mr. Cass): This is apparently the same map we had before, only on a reduced scale, is it not?

A. I just wanted to take in a little more.

Q. This runs clear down to the end of Molokai, on a reduced scale?

A. Yes, on a scale of 1 inch to 2,000 feet.

Q. And as you testified, as these sections are put together the sections are fitted in at the boundaries of the various sections as they appear and the interior is not changed? A. No.

Q. So that this, although it is on a scale of 2,000 feet to the inch, is plotted or traced from the other map or photostat, I presume it is traced from the other map because the other map is one section?

A. And there may be additions.

Q. There may be additions? A. Yes.

Q. But they would show on this map?

A. Yes.

Q. From your inspection up there, has there been any material alteration of the shape of the plat on this map?

(Testimony of H. E. Newton.)

A. No. It is drawn on a smaller scale, that is all, a different scale.

Q. And this is the map from which apparently the sketch that appears attached to the grant was taken?

A. That is possible.

Q. Yes. On all those boundaries up there with the exception of the Government survey points and the statement in the grant that it follows the pali, are any land markers [469] or monuments set out?

A. Not in the grant itself.

* * * * *

Q. I asked you if there appears on this map, for the record, any indication along the disputed boundary lines or on the Waikolu boundary line, anything other than the straight line, showing a natural monument described by name or otherwise on the map itself?

A. It is a reproduction of the larger scaled map and it would be absolutely the same as the other.

* * * * *

Q. That last boundary, starting from the point "cross on rock" there, is there any land marker other than the survey station mentioned?

A. It runs along the top edge of the pali, around the Waihanau Valley, and across the stream, up to the top of the spur ridge.

Q. I am speaking of the language of the grant. There is no stream mentioned in the grant, is there?

A. No. The map is a part of the description also. [471]

(Testimony of H. E. Newton.)

Q. Would you look at the grant there and find out where the word is that makes the map a part of the description?

A. That is according to law, when you issue a patent.

* * * * *

Q. But is there any natural monument or other monument from the point "cross on rock," around Puu Kaeo, is any natural boundary fixed or described other than the general line of the pali?

A. The general line of the pali is on the top edge of the Waihanau Valley, according to Monsarrat's map, thence he crosses a gulch or stream in Waihanau, thence in a meandering line along the top edge of Waialeia Valley to Kaluahauoni station.

Q. Yes. Now, going back to Mr. Monsarrat's field notes. Have you your copy there? This is mine. Now, I invite your attention to the bottom of page 112, which is from the station [472] marked "cross on a rock" apparently, the word "waterfall," has a bearing of 297 degrees 20 minutes 30 seconds. I am through with this map. I am not going back.

A. Are we going to read some more on it?

Q. No. This is pau. Now, from this point "cross on a rock" here, using roughly these various lines, shots, topography markers, can you tell which waterfall was meant by this entry? Taking it from point "cross on a rock," referring to Applicant's Exhibit A.

(Testimony of H. E. Newton.)

A. Well, he referred to a Waiau Falls.

Q. Now I am talking about taking it from the bearing of 297 degrees 20 minutes. Here is 280. From that same point. Ten degrees farther to the left. [473]

* * * * *

A. 297 degrees 20 minutes 30 seconds is from a point on the boundary of Kahanui—not Kahanui but Makanalua and Kalamaula, the point down near Kaohu station, Point Z.

Q. From a line 297 degrees 20 minutes plotted in, from Kaohu station, in this Exhibit A, what waterfall is he referring to there?

A. Naturally he was sighting to this large waterfall.

Q. To the big waterfall, wasn't he?

A. Yes, sir. That is the very point, Point Z.

Q. Yes. Now, Mr. Newton, if Mr. Monsarrat has made a sketch purporting to be the boundaries of a line and on the line he has placed a natural monument, would you say that the boundary indicated runs through that natural monument?

A. Well, if it is indicated somehow or mentioned in the description, that would have to be definite. You cannot guess at it.

Q. Suppose he has on the same page that he has sketched the boundary line and suppose he has in his shots indicated not only one place a natural monument of that sort but he has put in the sketch showing the boundaries of the line of the particular monument or the word describing that monu-

(Testimony of H. E. Newton.)

ment. Would you say that that monument then was on the boundary line intended by Monsarrat? [474]

* * * * *

A. It seems to me that if he intended to go through the waterfall he would have said "along to the waterfall and through the waterfall." The boundary says it runs along the top edge of the pali, around the head of Waihanau Valley. If that went to the waterfall, he would surely say "to the waterfall."

Q. Mr. Newton, I am speaking now of the sketch in his field book. He sketched the boundaries of this land in his field book and noted a monument on the sketch that he had in the field book, showing the boundaries by that monument. Would you say that that monument then was on the boundary?

A. No. He located that point. Yes, he located the waterfall to show it on his map but when he actually wrote his description he said it ran along the top edge of the pali.

Q. Please answer the question I asked. If he has located and noted the monument and has made a sketch in his field book showing the boundaries of the line in question running through that monument, would you say that that natural monument was on the boundary?

Mr. Flynn: I will object to the question as without foundation unless counsel makes a showing to the witness that such a sketch exists in the field book.

Mr. Cass: All right, we will do that.

(Testimony of H. E. Newton.)

Q. (By Mr. Cass): Mr. Newton, I invite your attention to [475] page 112 of Exhibit 16, Monsarrat's notes. That is the same page upon which the word "waterfall" appears?

A. Yes. I see it. Yes, I have it.

Q. The only place where "waterfall" appears on that page, on the right-hand side of the page, is a sketch with the words "Kahanui" on one side of a straight boundary line and "Waihanau Valley" on the other side of that boundary line.

Mr. Flynn: I object already, your Honor. It is not identified as a straight boundary line.

The Court: Let counsel finish his question.

Q. (By Mr. Cass): At about the center point of that straight line that appears on that sketch is "waterfall." Do you recognize what I have been saying in connection with this sketch?

A. Yes, I see it.

Q. That word "waterfall" appears directly on the boundary line indicated by Monsarrat. Would you say that that waterfall indicated by Monsarrat there is the same waterfall indicated in his survey notes?

Mr. Flynn: I will object to the question. The statement in the question that the word "waterfall" appears in the boundary line is insufficient until that is established as a boundary line. Counsel must first ask what that line is.

Mr. Cass: I do not have to. I have already asked him. I asked him before in my examination what these symbols meant in this book and he said

(Testimony of H. E. Newton.)

that where a straight line runs between two points and the names appear on either side of the line, it was a boundary line.

Mr. Flynn: That wasn't all of what he said. He also [476] referred to straight lines between fixed points for the convenience of the surveyor. This one has not been identified as a boundary line and I will object until it is.

* * * * *

The Court: We are concerned here with the sketch, of course, and according to this witness's designation a solid line does indicate a boundary in these field books. I think the designation is proper.

The objection is overruled.

Mr. Flynn: I will note an exception.

The Court: An exception may be noted. [477]

The Witness: Shall I answer the question?

The Court: Yes.

A. The line running from the point X? Is that the idea?

Q. (By Mr. Cass): The line running straight up the page from point X?

A. From Point X.

Q. Through "waterfall" to the Government survey station at Kaluahauoni?

A. If you will read the description there, the boundary itself is "around the head of the Waihanau Valley and the Waialeia Valley to Kaluahauoni station," and then he gives a direct bearing between two fixed points, the cross on rock and

(Testimony of H. E. Newton.)

Kaulahuki, which is a straight line, but the boundary is following the head of the valley, the head of the valleys.

Q. That is not what I asked you before. I asked you whether or not the waterfall that appears on there is not on the boundary line?

A. It happens to be on the line as you draw the line from X to Kaluahauoni, but it does not say a word about the waterfall.

Q. I am not talking about anything but what this sketch bears, Mr. Newton. If you will confine yourself to the sketch, we will get along better.

A. Yes; it happens to go through the waterfall.

Q. I am asking you particularly if this sketch, which shows the station on the boundary line between Kalamaula, Kaunakakai and the other portions which he surveyed, with lines indicating those boundaries, the lines leading from those stations, indicating the boundares of the various tracts which he [478] surveyed, and continuing around here to a tract labeled "Kahanui," which is a waterfall on the boundary, if that is not a boundary line?

A. It is not, to my knowledge of surveying, what this sketch actually shows. This is merely a direct bearing and distance between the two points.

* * * * *

Q. This is Applicant's Exhibit J, being the grant that was issued at first. I invite your attention to the sketch attached to the grant and particularly to the wording above the sketch there "Waihanau Valley" and the wording "Makanalua

(Testimony of H. E. Newton.)

Valley" printed in and scratched out and the words "Waialeia Valley" inserted. Is that handwriting in the handwriting of Monsarrat?

A. Yes, it is Monsarrat's handwriting.

Q. Now, in the exhibit we have just had before us, the [479] survey book, Territory's Exhibit 16, turning again to the sketch on page 112, I invite your attention to the words "Waialeia Head" and the scratched out words "Makanalua Gulch."

A. Yes.

* * * * *

Q. (By Mr. Cass): Does not that indicate to you that the sketch in Monsarrat's field book was used to prepare the description by Monsarrat that is used in the grant?

A. Partly. The original grant, which was cancelled—shall I say anything more?

The Court: Yes.

A. The original grant was cancelled because there were misspelled words and they thought it was better to write a new description of the land of Kahanui Apana 3. So they [480] made some corrections. That is why these corrections were added to the bottom of the original grant written by Monsarrat himself. "Thence around the head of the Waihanau Valley, following the pali to Kalawao and around the Waialeia Valley to the Government survey station." I believe it was the Government survey station at Kaluahauoni. And then the sketch plan is also added too. In the original sketch plan they only have the Makanalua Valley, and

(Testimony of H. E. Newton.)

then it was corrected in pencil by Monsarrat to read "Waihanau Valley and a spur ridge in between," and then Waialeia Valley.

Q. The same corrections appear in his survey notes, do they not? A. I believe so.

Q. Well, look at them.

A. I have the survey notes.

Q. You have the survey notes right in front of you, the sketch?

A. No. You gave me the one that was cancelled.

Q. No. I am speaking of the sketch now. The same corrections that were made on this grant appear in the sketch that we have in the field notebook?

A. Yes. The field notebook shows this to be Waihanau Valley. It was written over the word "gulch," which was scratched out. Then where Waialeia Valley is should be——

Q. Makaanalua?

A. "Makaanalua Gulch", which was scratched out and the word "Waialeia" inserted.

Q. And those are the same corrections that were made on [481] the reissued grant, were they not?

A. Yes. The name of the valley "Waialeia" was incorrect in the original.

Q. Does that or does that not indicate to you that this sketch was used by Monsarrat in the preparation of his description of this land?

A. These corrections were made by Monsarrat.

Q. I ask you, does it indicate to you that he

(Testimony of H. E. Newton.)

used this sketch in making his description of this land?

A. Well, this survey was made by Monsarrat from his own map, yes.

Q. And from his field notes and sketches?

A. He had reproduced his field notes on a map and then he made a description from his map.

Q. Mr. Newton, I wish you would answer the questions. A. I am answering them.

Q. And not evade them.

A. He could not write the description before making his map. [482]

* * * * *

Mr. Cass: Go back to the question I asked before.

Q. (By Mr. Cass): Does the change in the field book, which is apparent on its face, and the change upon the cancelled grant, which appear as changes in the permanent grant, indicate to you that Mr. Monsarrat used this sketch in his field notebook?

The Court: Mr. Newton, do you understand the question?

Q. (continuing): In preparing the description of the land to be conveyed by the grant?

The Court: Do you understand the question, Mr. Newton?

A. The sketch is not drawn to scale so that you have to reproduce——

Mr. Cass: Another argument. [483]

(Testimony of H. E. Newton.)

A. (continuing): —it before you can even write your description.

The Court: Do you understand this question?

A. The sketch in the field book, you cannot draw a description from the sketch in the field book.

The Court: Let me repeat. Do you understand the question that was just put? Do you understand that question?

A. I don't quite grasp the question. I don't quite grasp what he is trying to get at.

The Court: All right, Mr. Cass, repeat your question then.

Mr. Cass: Will you please repeat the question?

(The question was read by the reporter.)

A. Naturally he did.

Q. (By Mr. Cass): He did. Then it is apparent from the field book and from the lack of any other field book in your records that Mr. Monsarrat did not run a separate survey to determine that description but took it from the notes of this particular survey. Isn't that true?

A. He was making a general survey and this was part of the survey.

Q. Oh, please answer the question, Mr. Newton.

A. In his survey of the line there he actually surveyed this piece of land. * * * * * [484]

Q. (By Mr. Cass): Now, Mr. Newton, I have asked several times during the course of this trial if there is any proof in your own personal knowledge or in the records of the survey office as to

(Testimony of H. E. Newton.)

who [486] actually put the sketch of Kahanui on the various Government maps that have been in existence. Is there such proof?

A. I cannot say absolutely.

Q. Each time I have asked that you have answered with a statement as to the customs of the survey office. Do you know or do you not know whether Mr. Monsarrat actually put those things on his map, speaking of the sketch of Kahanui?

A. Well, I would like to see the sketch. I know Mr. Monsarrat's handwriting.

Q. I am not speaking of the handwriting; I am speaking of the Government's maps now.

The Court: Mr. Newton, you have undoubtedly been a witness in many many cases, but the requirement in law is that you answer the questions directly to facts within your own knowledge.

A. Yes.

The Court: Do you feel that because you do not have any facts within your own knowledge or you do not know something, do not feel that you are not entitled to say so. If you don't know, say so. If you do have those facts within your own knowledge which will answer the question, please answer the question accordingly.

A. Yes.

The Court: But you are definitely entitled on facts that you don't know—for instance, the instant question, you either know or you don't know. If you don't know, immediately state that you don't know. I think if you will bear that in mind it may help you.

(Testimony of H. E. Newton.)

The Witness: Will you repeat the question?

Mr. Cass: Please, Mr. Reporter, read the question.

(The question was read by the reporter.)

A. I don't know definitely.

Q. (By Mr. Cass): Now, speaking of the sketch which is attached to the patent 3437, do you or do you not know who placed that sketch upon the map? A. I don't know definitely.

Q. Do you or do you not know whether the sketch attached to the patent was made before the boundary marked on Monsarrat's work sheet, that is the first map we had here, was traced in with that red line? A. I don't know definitely.

Q. You don't know whether or not that tracing was actually on a Government map prior to 1888?

A. I don't know unless I am just told by the date of the map itself.

Q. But the map, you testified, had additions from time to time; that is right?

A. Any additions were very few. [488]

* * * * *

Mr. Cass: Now, may I have again Monsarrat's work sheet, the original, the first one.

Q. (By Mr. Cass): Now, the work sheet here has on its smudge line a point marked K, apparently used with the dividers to mark things off. That is the point you adopted for your boundary point? [494]

A. Yes. K was one of the points.

Q. What other points located on this work

(Testimony of H. E. Newton.)

sheet? A. Point A, on top of the ridge.

Q. K and A are the two points that appear to be marked upon that boundary at all. Now on the ridge over here appears—— A. "Tree W."

Q. "Tree W."? A. Yes.

Q. Point "C"? A. Yes.

Q. And to Point B? A. "B."

Q. And on the upper Waikolu edge of the valley is what? A. "B".

Q. And there appears in this work sheet a number of pin pricks along the outside edge of this, throughout that entire boundary?

A. Yes.

Q. Now, what were those pin pricks put there for?

A. Well, I believe they were the little pin pricks that went through onto the finished, onto another sheet, onto the final map.

Q. The final map?

A. I have my opinion of the production of the second map. There was the work sheet and then there was the finished sheet.

Q. And that is the method used by surveyors to transfer from one map to another, to put pin pricks through from one to the other and then to connect them on the other side? [495]

A. Yes, sir.

Q. You testified the other day that there is nothing in the field books that were introduced in evidence to indicate that any of these lines are on

(Testimony of H. E. Newton.)

the boundary of anything. I am speaking now of this I have just referred to.

A. No, they are not mentioned in the description itself, but they are shown on this working sheet as colored in to establish the limits of the land of Kahanui.

Q. But you don't know who colored that in, except by guess?

A. Monsarrat is responsible for the map.

Q. Again, you don't know who colored that in, do you?

A. Well, Monsarrat——

Q. Do you know?

A. Well, I did not see him do it.

Q. Do you have any records to show that he did do it other than your guess from the fact it is his map?

The Court: Mr. Newton, do you know of your own knowledge whether Mr. Monsarrat——

A. I do not know positively.

The Court: ——whether Mr. Monsarrat inserted the red that Mr. Cass is asking about? You either know or you don't know. Do you know of your own knowledge as a fact that he did?

A. No. That was before my time so I would not know.

The Court: You don't know?

A. I don't know, at the time he did the job, no.

* * * * * [496]

Q. Let's see if I understand your testimony. You testified that there is in existence this map in the survey office, that it is as far as you know the

(Testimony of H. E. Newton.)

only map or the first map from which the boundaries of Kahanui are traced on other maps. Is that true? A. Yes.

Q. You don't know whether the tracing of this map was made by Mr. Monsarrat or some other person? A. I cannot say definitely.

Q. Do you even know when, by a reasonable number of years, when that was traced on there?

A. This map is dated 1886. It was around that time.

Q. Do you know that all your map data was as it appears now or was this data later? I am asking you if you know. A. I don't know positively.

Q. It might be that this was not added until after this was granted. Isn't that true?

A. Maybe. In fact, I don't know and I cannot say.

Q. And the boundary on the straight line or near straight line [497] boundaries is the boundary established by Monsarrat's survey of these lower kuleanas or lower ahupuaas and adopted as the boundary of Kahanui. That is what appears in the field book, isn't it? A. Yes.

Q. The upper boundary here is a boundary sketched in without any location or record of the actual point where this boundary lays on the ground?

A. I cannot say that definitely or positively, outside of looking on this map there seems to be other points going through.

Q. But have you any record or any monument

(Testimony of H. E. Newton.)

set up, that a surveyor would set normally if he made a traverse of that boundary and set it up as a traversed boundary? A. He had flags.

Q. At the time that this survey was made?

A. Yes, he had flags on the boundaries. Yes. That is how he got his points. He sighted from the triangulation station over to these flags.

Q. Which point?

A. Flag Point X on the boundary of Kalamaula and Kahanui. He had a flag at Y on the same boundary.

Q. Those are monuments on that boundary?

A. Yes. He had to have flags to sight to. He had one at Kekeakula, at the southwest corner of Kahanui, and Puu Kaeo, which was a triangulation station, and Kaohu, which was a triangulation station, and Point A on the ridge.

Q. Does his book——

Mr. Flynn: Let the witness finish his answer, please. [498]

The Court: I don't think the witness finished his answer, Mr. Cass.

Mr. Cass: Go ahead.

A. And Point K on the northerly boundary of Kahanui, at the edge of the gulch. That completes the circuit. And thence back to X.

Q. (By Mr. Cass): Does his book show that either at K or A, you can look in the book if you wish to, that flags were set there, in the surveying of this land? A. He just——

(Testimony of H. E. Newton.)

Q. Look in the book and tell me whether the book shows that.

A. I know what is in the book. He sights to this Point K, marked in the field book, where he actually took sights to K, to X and to Y.

Q. These down here at this boundary we acknowledge were sighted, but these to Points K and A, does his field book show that he put flags there?

A. It doesn't show definitely, but he had to sight on something.

Q. It could have been a wood tree or a rock as well as a flag, could it not, or a dead tree?

A. It says "dead tree."

Q. What do the field notes say about those points; what did he sight on?

A. Page 112 of Field Book 2. That is station Y or I mean boundary Point Y in Kalamaula and Kahanui. He sighted to Point A, Ridge Point A.

Q. Does it show whether it was a flag station or what it was? [499]

A. I don't know just how it was marked but he had a point which he sighted at as Ridge Point A.

Q. But there is nothing in the book to indicate that he, in all his sighting, went across Ridge Point A to establish a flag station, is there?

A. I can't say definitely but he was sighting on something which he designated as Point Ridge A, and he shows Point A on the sketch plan as being on the ridge.

Q. Undoubtedly he sighted at something up there, but what I want to know, did he ever cross

(Testimony of H. E. Newton.)

the valley to establish the point over there, and not stand on the ridge and look at it.

A. He sighted at some definite point because he sighted several times at the same point.

Q. Now, as to the other point——

Mr. Flynn: May this question be more definite, instead of "to the other point," because there have been many points mentioned, your Honor.

The Court: Do you understand the question?

Mr. Cass: I am referring to the point K.

* * * * *

The Witness: I will have to look all over for this. [500]

* * * * *

Q. No. I just want you to find Point K, where he shot Point K.

A. I think you can find it sighted from cross on rock.

Q. And from Point X to Point Y.

A. From trig station Kalauhauoni he sighted to Ridge Point A.

Q. Yes, but I am asking about, I am speaking of Ridge Point K now.

A. Ridge point A was 59 degrees no minutes and to Point K 69 degrees no minutes, and then from Kauna Gulch——

Q. Which is the next station up?

A. At this point. He sighted to Point Ridge A, 154 degrees no minutes, and he has a sight along Kalamaula and Kahanui boundary Y, 134 degrees

(Testimony of H. E. Newton.)

35 minutes 30 seconds and Point K, 143 degrees no minutes.

Q. My question was, is there any indication whether or not any monument or flag was established at Point K?

A. I cannot answer that definitely. He had to have something to sight on.

Q. I am just asking from the record. I am not asking from your own knowledge. But from the record, is there anything to indicate? [501]

A. He sighted to that point several times so there was something there; something was certainly there at the time of his survey.

Q. Now, Mr. Newton, there was something there that he had sighted on. We admit that.

Now, just go over to your other map over there, Territory's Exhibit 10. Starting at Point X, you traversed as near as you could the line of the pali shown around where your boundary is indicated, did you not?

A. Yes, I ran a traverse around and located the edge of the gulch, new gulch, yes.

Q. Now, at Point K, at Point K did you find any monument?

A. No; I didn't even look for it.

Q. You did not look for Monsarrat's monuments?

A. In fact, I was making a general location myself.

Q. You did not look for any of Monsarrat's monuments?

(Testimony of H. E. Newton.)

A. It did not call for a monument. [502]

* * * * *

Q. Now, from your map and your sights, Mr. Newton, is there any place on this boundary, referring to the lower boundary here, the X, Y, Z boundary, where you take a shot on a waterfall at Waiau? I am speaking of this boundary (indicating).

A. Yes, I know. From Waiau waterfall, about at this point on the map, in the bend of the stream, where Monsarrat seemed to have used the word "Waiau."

Q. I am speaking of your survey. Could you make a shot at that place called Waiau? A. No.

Q. Can you see it?

A. No, you cannot see it.

Q. So, assuming that Monsarrat did all his work from the ridge, he never saw Waiau Falls, isn't that true?

A. Not the Waiau Falls that shows on his map.

Q. And there is nothing in his field books or notes to show that he ever knew of the existence of Waiau Falls, in the field survey of this land, is there?

A. I believe he has notes in his field book.

Q. Point them out, please?

A. It will take me some time. I believe he has; I am not positive. If you will give me an opportunity to look for them.

Q. Point them out in the survey.

* * * * *

(Testimony of H. E. Newton.)

A. In fact, I don't know where Waiau Falls is. The large [503] falls are not Waiau Falls.

Q. Of course not. But you testified you thought Waiau Falls was at the place where the line crossed the stream?

A. Yes. In fact, I located that waterfall or I mean a waterfall at that point, which I believe to be Waiau Falls referred to by Monsarrat.

Q. Mr. Monsarrat referred to some falls on the boundary, did he?

A. It shows on his map. That boundary crosses at about Waiau Falls.

Q. Crosses some falls. Which map are you referring to now, the sketch in his field book?

A. No, the map itself. The developed survey map shows that.

Q. The word "Waiau" appears?

A. Yes, Waiau there and the falls are right there. Right on this map it has "Falls Waiau," and that is at the, where the boundary crosses the stream to Ridge Point A.

Q. Couldn't that have been put there by Jake Brown when he identified the point for the sugar company?

A. No. It was on Monsarrat's map.

Q. I know it was on Monsarrat's map, but because the figures appear there does not mean that Monsarrat put them there?

A. It is his map.

Q. You have just said that it does not, that you have no way of knowing.

A. Positively, definitely.

(Testimony of H. E. Newton.)

Q. Now, apparently "Waiau Falls" appears on the map. Now there are two places that I can see in this field book, there may be more, on page 110. Refer to your own copy, please. [504]

A. Just a minute.

Q. That is the first sheet. At a point about two-thirds of the way down. Shooting from Kaohu.

A. Yes.

Q. What waterfall is that?

A. That is the Big Waterfall.

Q. All right.

A. He sights 297 degrees 28 minutes to waterfall.

Q. Now, from Point X—wait a minute now. Is that Point Z? No—here. Is this taken from Point Z?

A. That is on the boundary.

Q. That is on the boundary?

A. Boundary Z, yes. That is the point near Kaohu triangulation station. That is right near Kaohu station.

Q. That, then, is near the same station?

A. Yes.

Q. And shooting practically the same way, is that the same waterfall or is that Waiau?

A. No, that is the same waterfall.

Q. Now, at page 130. A. I have it.

Q. At the top, it has "Makakupaia."

A. Makakupaia.

Q. Where is that? It is clear over here?

A. Yes.

Q. The next name is Kamiloloa. So that that is

(Testimony of H. E. Newton.)

the survey of this boundary in here, is it not?

A. Yes.

Q. The word "waterfall" appears in that exhibit at about [505] the sixth word down in the column, and that has nothing to do with either the Big Waterfall or Waiau, does it?

A. I don't believe so.

Q. Now, I don't find anywhere else in the pages which have been photostated as being material any reference to a waterfall anywhere. Have you found any other reference to a waterfall?

A. No. There are other waterfalls but not this particular waterfall. [506]

* * * * *

Q. All right. Now let's move to Grant 3539 to R. W. Meyer. I invite your attention to the sketch accompanying this grant.

A. Yes, sir. [507]

* * * * *

Q. As I understand it, Monsarrat shot this ridge we have all taken from a distance along stations that he personally went over there to establish, is that right?

A. We have a lot of stations in the lower portions of Kalaupapa Settlement and he had set flags all along the top edge of the ridge, on both sides, and those were shot in later when he was doing his work. He took sights to all of these flags which he had set on both sides of that ridge.

Q. Mr. Newton, you used the words "which he had set." You don't mean that Mr. Monsarrat per-

(Testimony of H. E. Newton.)

sonally went up to the top edge of the ridge there and staked flag poles up there?

A. No; he had kamaainas working for him.

Q. Those kamaainas were his workmen, and whoever set the flags went up there to where they could see the instrument and they took a shot at it?

A. Yes; he had several flags set around the entire ridge.

Q. Mr. Monsarrat did not actually climb over the land to each one of those flags; he had his men do that?

A. The men set the flags on the edge of the pali and Monsarrat took the field notes.

Q. The question is, was Monsarrat up on the edge of the pali with those men when those flags were set?

A. No, he did not go up to the top at all on that particular job.

Q. You spoke also of the height of Waiau Falls and you [509] said that you could cut a path around the side of the road, if I remember correctly, or that you could cut a trail around Waiau Falls and go around it. You could not climb the falls themselves. Do you remember saying that?

A. The falls are 22 feet high.

Q. But you said you could get around them by going around the side? A. Yes.

Q. And you said you cut a trail there. You don't mean you actually cut into the wall on the side; you mean the brush on the trail?

(Testimony of H. E. Newton.)

A. Just brush and jungles in there, where they have the ieie vines. [510]

* * * * *

Q. Mr. Newton, has there been produced in this action all the documents relating to the title, claim of title of the Government to the area in dispute here, that are in existence so far as you know in the files of the survey office or the land commissioner?

A. I believe so. [512]

Redirect Examination

Mr. Flynn: Now, if I may see our exhibits 11, 12, 13, and 14.

Q. (By Mr. Flynn): A while ago when Mr. Cass was questioning you, Mr. Newton, you looked at the original of Registered Map 1259 and pointed out that the line made up of a dash and two dots and then again a dash and two dots was a boundary line delineated on this map for the southern boundary of Kahanui and also the western boundary of Kahanui. Is that right?

A. Yes.

Q. And no such line did exist for either the northern boundary or the western or the eastern boundary of Kahanui, Apana 3, is that correct?

A. It is a curved line, according to the plan.

Q. That does not appear on this map the dash and two-dotted boundary line?

A. No.

Q. To determine as to those boundaries?

A. No.

Q. I will now show you Territory's Exhibit 12, which is the finished map of 1886, map and survey

(Testimony of H. E. Newton.)

of M. D. Monsarrat, bearing Registered No. 1260, and I will call your attention to the boundaries of Kahanui Apana 3 and ask you to state whether all of the boundaries, that is the north, east, south and west, are delineated in this finished map in the established manner by delineating the boundaries, namely, a line composed of a dash and two dots?

A. Yes, that is correct.

Q. Now, let's examine Territory's Exhibit 13, which is Registered Map No. 1289, being the 2,000-foot to the inch scale working sheet of Monsarrat of 1886, according to the stamp on it at least, and I call your attention again to the boundaries of Kahanui Apana 3 1048 acres, and ask you to point out whether all of these boundaries are marked out in the same boundary line of a dash and two dots?

A. Yes, that is correct.

Q. Now, calling your attention more carefully, is there not a solid line instead of a dash and two-dotted line between points equivalent to X and A, as shown on the many exhibits in this case?

A. Yes. On this particular map, yes.

Q. Now, if you know, was there a solid line, as distinguished from a dash and dot line, used for any particular purpose? Once again, if we may look at the original map, which is Registered Map No. 1289, it may be easier for you to answer it. This is the original of the map which has the solid line there.

A. Yes.

Q. And if you will note has solid lines in other places as well?

(Testimony of H. E. Newton.)

A. I really could not say just why I made a distinction between the two lines. This is one and the same boundary and half of it is a full line and the rest is a dash and two [518] dot line.

Q. Are there any other portions in the near vicinity of Kahanui Apana 3 where boundaries appear to be marked with a solid line instead of a dash and two-dot line?

A. Yes. Down near the coast line, the edge of the slope shown as a solid line or full line.

Q. I call your attention to Kalaupapa and Kalawao, being north of those areas and included within this map.

A. I take that back. That was in the ocean. Along the pali, sloping down into Kalaupapa and Kalawao.

Q. Then a solid line was used to indicate a boundary along the palis?

A. Yes. It seems to be that way.

Q. Now, Mr. Newton, I will show you Territory's Exhibit 15, which is Registered Map No. 1890, working sheet of Monsarrat, scale 1,000 feet to the inch, dated 1895, and call your attention once again to the boundaries of Kahanui, Grant 3437, Meyer, as shown on this map, and ask you whether all of the boundaries of Kahanui, Grant 3437, are again outlined in established boundary markings, namely, a dash and two-dot line?

A. Yes, that is correct.

Q. Now I will finally show you Territory's Exhibit 14, which is the 1886 finished map by M. D.

(Testimony of H. E. Newton.)

Monsarrat, scale 2,000 feet to the inch, and call your attention to Kahanui Apana 3, Grant 3437 to R. W. Meyer, apparently having been superimposed later, and ask you whether all of the boundaries of Kahanui Apana 3 on this map are delineated in the customary manner by a line composed of a dash and two dots? [519]

A. Yes, that is correct.

Q. I believe you have stated, Mr. Newton, that in your survey you find Monsarrat's northern boundary of Kahanui Apana 3 to correspond closely to your own northern boundary of Kahanui Apana 3 where that apana joins or is bounded by Waihanau Valley. Is that correct? A. Yes.

Q. Does your boundary go through from Point X through fixed points K and A? A. Yes.

Q. Does Monsarrat's boundary go through the same fixed points K and A from X? A. Yes.

Q. And as far as the lines of the northern boundary are concerned through those fixed points, yours and Monsarrat's coincide, is that correct?

A. Yes. Very closely. [520]

* * * * *

Mr. Flynn: I have before me the original transcript of the testimony from the records of the clerk of the First Circuit Court, bearing Transcript No. 884, in Law No. 14859. I offer into the record and if the offer is accepted I will read into the record the testimony of two persons now deceased, namely, Jorgen Jorgensen and Hugh Howell.

I do not believe counsel will dispute that the two persons are deceased.

Mr. Cass: I concede that they are deceased.

Mr. Flynn: To support this offer, I will state that the issue on which these two witnesses testified was identical with the issue in the present case, namely, the boundary between Kahanui 3 and Waihanau Valley. We are therefore offering this as testimony from a former trial of witnesses now deceased. [523]

* * * * *

The Court: Isn't that something that can wait until some other stage of the proceeding? Do you have any witnesses here waiting?

Mr. Flynn: Yes, I do.

The Court: Let's take them first.

MAX H. CARSON

a witness called by and on behalf of the Territory of Hawaii, being first sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Flynn): Will you state your full name please? A. Max H. Carson.

Q. Your occupation or profession, Mr. Carson, please?

A. I have a dual position; I am chief hydrographer of the Territory and I am also district engineer of the geological survey, water resources division. [530]

* * * * *

(Testimony of Max H. Carson.)

Q. Now Mr. Carson, have you ever been on the lands of Kahanui Apana 3 and/or the lands of Waihanau Valley on the island of Molokai?

A. I have been on Kahanui; I am not sure whether it is Apana 3 or not, but the land that was involved in a condemnation suit back in 1929 or 1930.

* * * * *

Q. Can you state when you went into the lands of Waihanau Valley, approximately?

A. Yes. My first trip over there was in connection with that condemnation suit that I just mentioned. Mr. Hewitt had told me that there was a question likely to arise as to the value of the water rights there, and on the last day of March 1929 I went over there with Sam King and Francis Evans for the express purpose of finding out what I could on the ground in regard to the value of the water rights. [531]

* * * * *

A. Bill Meyer and Henry Waiwaiole were with me on both of these days pointing out the boundaries.

* * * * *

The Witness: Bill Meyer, yes.

* * * * *

A. April 1929, April 1 and 2. [533]

* * * * *

Q. (By Mr. Flynn): What, if you know, Mr. Carson, was the capacity of Henry Waiwaiole to the Meyer family interests, Meyer land interests?

(Testimony of Max H. Carson.)

A. He was one of the Meyer clan; I don't know the exact relationship. [535]

* * * * *

The Court: Mr. Carson, a minute ago you indicated you would like to amplify your statement relative to this information. [536] You may do so now, if you so desire.

A. I wanted to amplify it to the extent that, as I said in the first place, I had these men go around with me and point out these boundaries, and the reason that was done was because I wanted to measure the water at the boundaries. That was the purpose of my asking them where the boundaries were. I needed guides. I did not know the country. And they acted as my guides. I think that is sufficient.

Q. (By Mr. Flynn): If you will confine your answers for the time being at least, Mr. Carson, to what William Meyer did with you.

* * * * *

A. He took me up there along the ridge to a point just above where the boundary crossed the stream and told me the boundary was there.

Q. (By Mr. Flynn): Can you describe more definitely where that point was, Mr. Carson? [537]

A. It was a place called Waiau.

Q. It was a place called Waiau?

A. Yes. I measured just below the pool. It was one job to get down there too from the ridge.

Q. I show you, Mr. Carson, a map bearing the identification "Department of the Interior, U. S.

(Testimony of Max H. Carson.)

Geological Survey, topographic map of the island of Molokai, Hawaii."

* * * * *

The Court: It will become Territory's Exhibit 21 in evidence.

(The document referred to was received in evidence as Territory's Exhibit 21.)

Q. (By Mr. Flynn): Now, showing you Territory's Exhibit 21, [538] Mr. Carson, and calling your attention to the lands marked "Makanalua," lands marked "Kahanui Apana 3," I will ask you if you can locate on this map the point you have just stated was referred to you by William Meyer as Waiau or the boundary between Waihanau Valley and Kahanui?

A. I would say it was about in here.

* * * * *

Q. I will ask you to mark a large X at that point. A. I will circle it.

Q. Or circle it. Will you write the word "Waiau" there? That is the location of Waiau as shown to you by William Meyer?

A. That is as close as I can spot it on that map.

* * * * * [539]

Cross Examination

Q. (By Mr. Cass): Did you testify that Mr. William Meyer was a representative of the Meyer family? A. Yes, I did.

Q. Where did you get any idea that Mr. Meyer

(Testimony of Max H. Carson.)

was a representative of the Meyer family?

A. When we got over there that night we were taken up to Otto Meyer's place at Kalae and we started out in the morning and Sam King introduced him to me as one of the Meyers that will show me around.

* * * * *

Q. Did you explain to anybody but William Meyer where you wanted to put your measurements?

A. Yes. Sam King knew.

Q. You explained to Sam King? [541]

A. Yes. They knew what I was there for and they took me around to show me their sources of water. We went not only there but to Waialeia and they have a number of springs in there and we went down and measured the springs.

Q. Sam King arranged, then, for William Meyer to show you around?

A. That is right.

* * * * *

Redirect Examination

Q. (By Mr. Flynn): Mr. Carson, what, if you know, was Sam King's capacity or connection with the Meyer interests at that time?

A. He prepared an appraisal of the whole property, which he submitted to Judge Robertson. He sent me a letter a few days after we got back, saying he was giving me a copy of his appraisal and statement that he had followed my figures on water pretty closely. Actually he followed them exactly.

(Testimony of Max H. Carson.)

Q. To your knowledge, was Judge Robertson counsel for the [542] Meyers at that time?

A. He was later. Whether he had already been retained, I don't know, but he represented them later in the case, I know. [543]

* * * * *

R. M. TOWILL

a witness called by and on behalf of the Territory of Hawaii, being first sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Flynn): Will you state your name, please?

A. R. M. Towill.

Q. And your profession or occupation, Mr. Towill?

A. I am a civil engineer and land surveyor.

Q. Civil engineer and land surveyor?

A. Yes.

Q. Mr. Towill, I will show you Territory's Exhibit 5-A for Identification, Territory's Exhibit 5-B and Territory's Exhibit 5-C, which constitute a group of three photographs placed on a plastic paper, and ask you if you recognize these photographs?

A. I do. [544]

Q. Did you take these pictures, Mr. Towill, or were they taken under your supervision and direction?

A. I personally took them.

Q. These are photographs of the mauka lands of Kahanui, of Makanalua, of Waihanau Valley,

(Testimony of R. M. Towill.)

and in part the upper or mauka Kahanui, are they not, on the island of Molokai?

A. That is correct.

Q. These, of course, are airplane photographs, are they not, Mr. Towill?

A. They are aerial photographs taken from an aeroplane.

Q. Now, were those photographs taken in accordance with a procedure known as photogrammetry?

A. That is right.

Q. Will you state just what that process is, photogrammetry?

A. The nomenclature of photogrammetry, meaning measurement taken from pictures, the simple definition. [545]

* * * * *

Q. Now, the final map you are talking about, is that used in the same sense as the word you previously used—mosaic?

A. There are several types of finished maps that are made from aerial photography. First there is a planimetric map that is made from stereoscopic measuring instruments; that gives us polimetry and contours, and it is made on tracing paper and can be reproduced by either the blue or white print method. And then there are your mosaics, which are made in instruments to reproduce to scale the aerial photographs. It is also possible to superimpose on this mosaic the verticle elevations by means of contours.

Q. With regard to the vertical elevations by

(Testimony of R. M. Towill.)

means of contours, can you state from your own experience, Mr. Towill, whether you have found the vertical elevations by means of contours, that are placed upon shown in such products, accurate or reliable? A. Very reliable, yes. [547]

* * * * *

Q. Mr. Towill, from examining the three pictures, Territory's Exhibits 5-A for Identification and 5-B and 5-C, it would appear that the same were taken in a series. Is that correct?

A. That is correct. In order to get the third dimension from pictures, using a stereoscope, it is necessary to have at least 50 percent overlap to insure proper stereoscope vision. However, the general practice is to take at least 60 percent for mapping purposes. In other words, about 60 percent of the picture is covered by another photograph in order to insure proper vision.

* * * * *

Q. As to these pictures, which are Territory's Exhibits 5-A, B, and C, for Identification, can you give the scale or the approximate scale?

A. These pictures are approximately 800 feet to the inch. [548]

* * * * *

Q. Now I will show you, Mr. Towill, Territory's Exhibit 1 for Identification, bearing the identification "Attorney General's Office, Territory of Hawaii. Control topographic mosaic showing portions of Kahanui and Waihanau Valley." Was this mosaic made by you or under your supervision?

(Testimony of R. M. Towill.)

A. It was made by me and under my supervision.

Q. Was this made from the photographs or additional photographs similar to Territory's Exhibits 5-A for Identification, 5-B and 5-C?

A. It was.

Q. What are the numerous black lines in this mosaic, Mr. Towill?

A. They represent the contour lines or different elevations of the area.

* * * * *

Q. The contour lines are how frequent?

A. These contour line control intervals are 40 feet.

Q. 40-foot intervals?

A. 40-foot intervals.

* * * * * [549]

Q. Can you state whether the mosaic here together with all of the contour lines thereon are an accurate reproduction of what you have seen both on the ground and from the air?

* * * * *

The Court: It will become Territory's Exhibit 1 unconditionally, in evidence.

(The document referred to was received in evidence as Territory's Exhibit 1.) [550]

* * * * *

The Court: For the record, let the witness state what the machine consists of, this stereoscopic machine now about to be used or offered for use.

(Testimony of R. M. Towill.)

Mr. Towill, will you describe the machine for the record?

A. The instrument is a type of stereoscopic instrument consisting of a mirror, a prism, which the mirrors reflect onto the prisms, which are set at the pupillary distance of the average person to show the photographs in the third dimension.

Q. (By Mr. Flynn): May I ask you, Mr. Towill, whether any average, ordinary, layman can use or see through this stereoscopic machine and get a good clear view of the single three dimensional photographs shown by the combination of the two photographs?

Mr. Cass: We object to the opinion of the witness on that matter. [552]

The Court: The objection is overruled.

A. Yes. It is very easy for the average person to view photographs through this stereoscope. I might add that for viewing photographs through a stereoscope it is necessary to adjust the two photographs to the pupillary distance of the individual. In other words, if I were to adjust two photographs for my pupillary distance, it might be a little out of focus for someone else not having the same vision. However, by manipulating or moving them into position under the stereoscope anyone should be able to see under the stereoscope, except people who have a vision only in one eye. Unless you have vision in both eyes it is impossible to use the stereoscope.

(Testimony of R. M. Towill.)

Q. (By the Court): That is the only physical limitation?

A. Yes. [553]

* * * * *

Mr. Cass: I will withdraw my objections to the use of the machine in identifying objects in the way that it is suggested. The center picture can be loosen and used as an adjustable picture on the two outside pictures, and I believe then that anyone can see through the machine.

The Court: Very well.

* * * * *

Q. (By Mr. Flynn): Now, I will ask you to adjust the machine and examine the first two pictures, Exhibits 5-A and 5-B, through the stereoscope, Mr. Towill.

A. Yes.

Q. Now, from your familiarity with these lands and also of the pictures which you have taken,—and may I call your attention to Applicant's Exhibit A, a map, and call your attention [557] to areas indicated by the word "intake" and just makai or northerly of that point, and ask you whether you know the name of the falls which it has been agreed was located just below that intake?

A. I don't know the name of the falls.

* * * * *

Q. You do, however, know where those falls are located, a short distance makai or below that intake. Is that correct?

A. I have been at this place.

* * * * *

Q. First I would ask you to trace up the course

(Testimony of R. M. Towill.)

of the stream on each picture from that falls point that you know.

A. Well, starting from the falls, on Photograph 5-A, on 5-B, the stream follows a southerly direction up for probably 400 feet and then it turns easterly, I guess that is. It turns westerly. And then it follows along a gradual curve for another 700 or 800 feet, in practically a southerly direction, and then it has a series of winds probably 300 or 400 feet in either direction, still following a southerly direction, and then we have almost an S bend in the stream, two ridges. As you go along from there the stream separates [558] into three forks, one running in a southerly or maybe a southeasterly direction, one in a southerly direction, and one in a southwesterly direction.

Q. Where is the separation of the stream into three forks with relation to the S bend and overlapping ridges point you have just referred to?

A. The first stream starts approximately 1200 feet up above, the one that continues of course, and then there is the one that goes to the southeasterly, it is probably 1600 feet. I will have to clarify that. The one that goes in the southeasterly direction is approximately 1200 feet. The one that runs in the southwesterly direction is probably 800 feet, and the main stream that continues on in a southerly direction, kind of a three-fingered fork. [559]

* * * * *

Q. (By Mr. Flynn): I will ask you now to examine Territory's Exhibit 1 for Identification. I

(Testimony of R. M. Towill.)

am sorry. It is Territory's Exhibit 1 in evidence.

* * * * * [561]

Mr. Flynn: All I am interested in is to get points marked on the mosaic and arrive at a condition where they can be checked with the stereoscopic view of the two photographs.

Mr. Cass: That is all right. The thought occurred to me that the superimposition of the contour lines on there did not check up with the testimony or with the necessity of having two pictures to see the depth. [562]

A. The contours were made through the stereoscope plotting device by using two pictures and then they were traced and superimposed on a mosaic in their proper position.

* * * * *

Q. (By Mr. Flynn): Now, Mr. Towill, I will ask you to examine Territory's Exhibit 1 and state whether you can locate the S-bend in the stream and the two overlapping ridges area you have previously referred to. Now, I will ask you, Mr. Towill, if you can on this mosaic locate the S-bend in the stream and the two overlapping ridges we have previously referred to?

A. May I start at this falls and go up?

Q. Certainly.

A. Tracing along the center of the stream, in sort of a southeasterly direction, until we get to a point approximately 1600 feet above the falls; then the stream makes an almost right-angle bend in a westerly direction and then a sharp bend back to

(Testimony of R. M. Towill.)

an easterly or southerly direction, forming an S.

Q. Will you place some mark or line coming down the ridge from the easterly side and going back up across the ridge from the westerly side.

A. How is that now?

Q. I ask you to draw a line coming down from the ridge on the easterly side and going back up the ridge on the westerly side, the two overlapping ridges that you have already referred to or two lines if you find that necessary. [563]

(The witness does as requested.)

Q. Now, will you take your red crayon and follow the course of the stream, marking it out, from the S-bend to the Big Falls?

(Witness does so.)

Q. That is the center line of the stream?

A. That is the center line of the stream.

Q. I don't believe we need to mark it that way, once you have stated it for the record.

Now, I will ask you to examine the mosaic. Can you state the elevation from the center of the stream at the falls or directly above the falls to the top of the pali on the west?

A. About 400 feet.

Q. 400 feet. Approximately 400 feet?

A. That is an elevation.

Q. Yes. Can you give the difference in elevation from the center of the stream to the top of the pali, again on the west, from the point where you show the beginning of the S-bend in the stream as you go south. I am referring to this point here.

(Testimony of R. M. Towill.)

A. Approximately 280 feet.

Q. 280 feet? A. Approximately 280 feet.

Q. Now, I will ask you to examine the stereoscopic view of Pictures 5-A and 5-B and I will ask you if you can trace the top of the pali between the two points at which you have just given the elevation measurements from the center of the stream. That would be from the point just above the [564] stream at the higher falls to the point just above the stream at approximately the S-Bend. I would rather have you trace it on the map.

A. All right, sir.

Q. You have done that? A. Yes.

Q. You have marked an X and a Y there, is that correct?

A. Yes. The X is just above the large falls on the pali and the Y as it comes out of the valley onto the edge of the pali.

Q. Now, I will ask you to locate that on, first, the mosaic, the edge of the pali on the opposite or easterly side of the stream, first at the area directly above the falls. A. Up to here?

Q. Up to the edge of the pali. First at the area above the falls. Well, then, first, will you estimate the vertical elevation from the center of the stream to the top of the pali on the opposite or easterly side? You have previously estimated it on the westerly side at the falls.

Q. At the falls on the easterly side of the valley, at the falls the land is not nearly as precipitous as it is on the westerly side of the falls, and

(Testimony of R. M. Towill.)

the pali—there are several series of palis between the falls and the actual pali along the top of the flat lands of the ridge. Is that what you want?

Q. Yes.

A. At the falls the elevation is approximately 2200 feet and up to the first ledge it is approximately 200 feet and then there is another pali area that goes up to another [565] 200 feet, making 400 feet, nearly, but on the top of the ridge it is rather flat and you have a gradual slope down for about 200 feet in elevation and then a little pali or drop and then a gradual slope again back to the stream. There are two palis along that side. The actual top of the pali is on top, I presume.

Q. Will you mark that actual top of the pali directly above the falls, on the east?

A. I have marked the lower.

Q. The lower of the palis?

A. The lower of the palis.

Q. Will you mark the higher of the two palis?
(Witness does so.)

Q. Now, will you trace along the higher of the two palis to a point where you are directly above or east of the S-bend in the stream?

(Witness does so.)

Q. Now, directly above the extreme mauka end or southerly end of the red line you have just drawn there is a small area, showing a higher elevation, and I am pointing to this circle about one and a half inches above the end of the last red line. Is that correct?

(Testimony of R. M. Towill.)

A. Yes. That contour is approximately 2700 feet. It is rather flat topped hill in that vicinity.

Q. Approximately 2700?

A. In elevation, yes.

Q. I will call your attention to this line as the 2600-foot line and ask you whether this is still approximate? A. 2760 feet. [566]

Q. 2760 feet?

A. At the 2700 elevation, represented by the top contour.

Q. You say that is a small flat hill?

A. Rather a flat topped hill.

Q. I will show you Applicant's Exhibit A and ask you whether that small flat topped hill can be identified by you on this map, Applicant's Exhibit A?

A. Yes. That area is right in here. It shows the pali going around and the flat area on the top. I was pointing on the mosaic. It is just about at the end of the area of the portion of land 3539 to R. W. Meyer.

Q. That is a point in the neighborhood of the writing near "M. D. M's Ridge A"?

A. M. D. M's Ridge A is marked at the approximate location, yes.

Q. Now, returning to the stereoscopic view, Mr. Towill, I will ask you to trace the top of the palis on the first two pictures, Exhibits 5-A and 5-B, between the point you have referred to as the falls and the point referred to as the S-bend in the stream, asking you to place the top of the pali on

(Testimony of R. M. Towill.)

both sides? A. From the falls?

Q. From the falls to the approximate area of the S-bend.

A. I traced it on the westerly side. Now you would like it on the easterly side from the falls. These two lines I have drawn here.

Q. You have not traced it on the westerly side here. This is the center line of the stream. You have traced it on the easterly side. [567]

A. I have traced it on the westerly side in one of the photographs.

Q. Yes, you have. That is right. If you will now add the easterly side.

A. Which pali do you want?

Q. I want the pali as it looks to you.

A. The greater of the two? All right.

* * * * *

Q. (By Mr. Flynn): Mr. Towill, returning to the stereoscopic view of the combined photographs 5-A and 5-B, I will ask you to trace on the photograph 5-B the outline of the top of the pali on the easterly side of the area we have referred to as Waihanau Valley or specifically between the points referred to [568] as Waihanau Falls and the S-bend above those falls in the stream?

A. That has been done.

Q. Yes.

Now, the lines as shown on the photograph, Exhibit 5-B, for the Territory, will you place also on the mosaic, Territory's Exhibit 1?

A. The same lines?

(Testimony of R. M. Towill.)

Q. Yes.

A. Opposite the "s" in the "stream" there is a hill; this entire area on the easterly side of the hill, the flat area, breaks off into the large valley to the east and on the west side of the pali there is a flat that comes out for quite a ways before it breaks into the stream. Which of the two palis do you wish, or both?

Q. If you can do so I would ask you to place the lines exactly as you have them on the photograph. What you have now drawn is approximately identical with the——

A. It is the same.

Q. On that photograph. It is the same. Very well. The line on the photograph reaching makai or northerly of where you have now drawn it goes a considerable distance beyond the present makai end of the red line you have just drawn in. Is that correct? A. Yes.

Q. Then I will ask you, if you can do so, to trace the line on the mosaic so that it goes as far makai or northerly as that shown on the photograph. Now, if I may look at the photograph for adjustments. [569]

From an examination of the photograph I note a very considerable distance where your line on the easterly ridge or that area approximately above the stream, between points Waihanau Falls and S-bend in the stream is a single line at each end of which you show in an encircled line, apparently to cover broader points of the ridge formation. Am

(Testimony of R. M. Towill.)

I right? A. That is right.

Q. Where you have the single line on the photograph? A. Yes.

Q. On the photograph. Is the ridge formation such where that single line is that the flat line between the edge or edges of the palis so narrow that an encircling or larger line could not be drawn and still stay along the flat land?

A. That is correct. Where the single line appears it is a hogback ridge; there is no flat on top at all.

Q. You have previously referred, Mr. Towill, on your mosaic to the small mound or hill or raised piece of flat land at the elevation of 2760 feet and you have identified that on Applicant's Exhibit A as coinciding with the small parcel of flat land as shown as a portion of Grant 3539 to R. W. Meyer, also containing the identification "M. D. M's Ridge A", is that correct?

A. That is correct.

Q. I would ask you to mark "A" on the mosaic at the point where it appears on the map, Applicant's Exhibit A, if you can do so.

A. M. D. M's A?

Q. M. D. M's "A".

A. Yes, they do coincide. [570]

Q. The two do coincide? A. Yes.

Q. Very well. Now, on the photograph Exhibit 5-B you have drawn a line on the westerly top of the pali above the stream from a point slightly below or makai of the Big Falls to the point approximately next to the S-bend in the stream. I

(Testimony of R. M. Towill.)

will ask you if you will reproduce the same line on the mosaic.

(Witness draws line on the mosaic.)

A. As to the westerly side of the stream from the S-bend, the ridge coming up from the S-bend along the edge of the rim of the pali to a point approximately opposite the falls.

Q. Have you not traced that point somewhat below or makai of the falls. A. Yes, I have.

Mr. Flynn: Now, for identification purposes, if counsel has no objection, I will write for this line the words "top edge of pali on westerly side of stream" and along this red line the words "top edge of pali along easterly side of stream."

Mr. Cass: I don't know that that is true. I know that it is the opinion of this witness.

Mr. Flynn: I will ask this witness to write it in then. It is what he testified to.

Mr. Cass: He has testified that in his opinion that is the top of the pali, yes; but I won't stipulate that is a fact.

Mr. Flynn: I do not mean for you to; I mean only for identification. [571]

Mr. Cass: For identification, yes. No reason why I should object to the identification.

Mr. Flynn: And, Mr. Cass, I will identify in here "center line of stream," all as testified to by the witness.

Mr. Cass: I have no objection to you lettering just what he has said that to be, for identification.

Mr. Flynn: That is what I mean.

(Testimony of R. M. Towill.)

Mr. Cass: Go ahead and write it in, Mr. Flynn. Anything he is doing in the way of identification merely lines the way his testimony is.

Q. (By Mr. Flynn): Mr. Towill, this is your Point A as coinciding with the Point A, M. D. M's Ridge Point A on the map, Applicant's Exhibit A?

A. That is right.

Q. May I ask you to identify Point A also on the photograph which is Exhibit 5-B for the Territory?

(Witness does so.)

Mr. Flynn: You may cross-examine.

Cross-Examination

Q. (By Mr. Cass): Mr. Towill, what is your understanding of the word "pali" in Hawaiian?

A. A precipice.

Q. A precipice. Then in your designation of the edges of the pali on this mosaic up here, you have tried to follow the edge of the precipice all the way around?

A. That is correct.

Q. And where the slope is gradual, you would not call it a pali? [572]

A. No.

Q. Now, just how steep in relation to your contour lines there does the land have to be before it is classified as a pali rather than a valley side or a gentle slope or other slope?

A. Will you repeat that question, please?

Q. I want to know, a drop off straight up and down is a pali?

A. That is right.

Q. You come off at an angle of 30 degrees from

(Testimony of R. M. Towill.)

the vertical. No man can walk down. That is a pali. You come down at an angle of 45 degrees; a man can walk down it if he is careful. Is that a pali?

A. I would like to say that on the westerly side of this valley, Mr. Cass, where I have drawn a red crayon line, it is very precipitous down into the stream at all places with the exception of the little finger ridges going down, which are very precipitous from the top and go down at a very steep angle on the westerly side.

Q. Yes.

A. On the easterly side of this valley, from the top of the ridge, which in this instance the ridge is fairly flat on top, the ground or the country slopes gradually for an area or for a distance from the top of the flat to where it breaks off maybe to, oh say a 40 or 50-degree angle and goes at that angle for quite a distance, and then you have another little pali that breaks off. In other words, along this side there is a series of—

Q. (interrupting) A series of hard rock benches on the [573] edge of the valley wall here, where there are straight up and down places?

A. That is right, varying maybe from 10 to 30 or 40 feet.

Q. Yes. This is, according to the contour, 40 feet?

A. 40 feet, yes.

Q. And the lines that you have drawn here are in your opinion where the land becomes so steep that it becomes a pali?

A. No. These contours are drawn at the eleva-

(Testimony of R. M. Towill.)

tion of which they are numbered on the map, without regard to the pali.

Q. The red lines——

A. The red lines indicate the average of the top of the pali along there. Some places it runs along a precipice in order to join two precipices, and they can cross sloping land.

Q. This is 1 inch equals 300 feet, according to your scale? A. That is right.

Q. Exhibit A is 1 to 400 feet, slightly smaller than this? A. That is right.

* * * * *

Q. Is that a trail or does it show on the picture?

* * * * *

[574]

A. There is evidence of an open area zig-zagging down this ridge.

Q. And indicating on your map the first ridge on the westerly side that comes down into the Valley above the Big Falls, the second ridge that comes down into the valley above the Big Falls, counting the ridge that actually goes across Big Falls as one? A. That is correct.

Mr. Cass: Nothing further.

The Court: Redirect.

Redirect Examination

* * * * *

[575]

Q. (By Mr. Flynn): I will ask you if you have been down to the Big Falls, Mr. Towill?

A. I have. * * * * *

(Testimony of R. M. Towill.)

Q. Have you when you have been down at approximately the Big Falls looked mauka up the stream?

A. Yes, I have traversed that stream for probably a half mile.

Q. Have you as you traversed the stream going mauka from the Big Falls observed the ridges which make the stream go into an S-bend?

A. Walking along the bottom or in the stream the overgrowth was such when I was there that it was difficult to see anything coming out at all. It was staghorn fern and occasionally a tree and unless you get up on the side someplace you cannot see hardly what the sides look like, you can only see from the top.

Q. I am asking you if, as you went along mauka from the falls towards the area, this S-bend in the stream, could you at any point see the two transverse ridges or overlapping ridges [576] you have referred to?

A. Yes. In getting out of there there is probably a 50-foot drop or a gradual drop from the stream down to the face of those precipitous falls, and to get down to there you come over on the side ridge and from the side ridge you can see up the valley and see those ridges. It is on the side of the stream, not in the stream.

Q. Did you see the two overlapping or transverse ridges at the point of the S-bend in the stream?

A. Yes.

Q. As you looked at those two overlapping

(Testimony of R. M. Towill.)

ridges, do those two overlapping ridges attain a position where they close off or block off the valley area?

A. There is that feature. The two ridges come across like this and you cannot see through them, no.

Q. Now, two more questions. Examining the stereoscopic view once again, you have stated that the valley at the point of the Big Falls is impassable as you go mauka. Assuming you are below the Big Falls, I will ask you whether from this view you can state if there are any other falls below the Big Falls which are an impassable point?

Mr. Cass: Now, you are asking him from traversing it himself or from the photographs?

Mr. Flynn: From the photographs.

A. There are two falls that appear in these two pictures—three falls that appear in these pictures. The one that I sighted on. You come down approximately, I will say, about 1200 feet, it looks like, or about 1400 feet, and there is a fall that is probably 160 feet high; and right down, [577] about 2500 feet possibly, there is another large fall which appears much larger than the upper one of the three.

Q. Of the three falls, the first being the Big Falls, we have consistently referred to as the one where you have been, and then one of the other two, are the other two as impassable or more or less so than the Big Falls which we will Call No. 1 for the purposes of this question?

(Testimony of R. M. Towill.)

A. The middle fall does not appear to be as precipitous as either of the other two. The lower of the three seems much higher and more precipitous than the other two.

Q. Than the other two? A. Yes.

Q. That lower one being approximately 2500 feet from the falls we have previously been referring to? A. That is correct.

* * * * *

[578]

The Court: Call your next witness.

Mr. Flynn: If the Court please, by stipulation I can offer within a couple of minutes some testimony that would be given if the witness were here. Counsel is agreeable to my making this statement as to what his testimony would be if called and to have that read into the record as testimony given in the cause. The witness being Samuel Wilder King, Honolulu real estate broker and appraiser, whose testimony is that in 1929 he was employed by the Meyer family through their attorney, Judge Robertson, to make an appraisal of the Meyer lands on Molokai, that he did go on the lands with Mr. Max Carson, who has testified here, and a few other persons, and was shown the lands by Mr. William Meyer of the Meyer family.

Is that correct, Mr. Cass?

Mr. Cass: So stated by Mr. King and accepted.

Mr. Flynn: If the Court please, that concludes all the testimony to be offered by the Territory with the exception of the testimony of the two de-

ceased witnesses, which is [579] to be read now in the record.

* * * * *

The Court: Proceed. Read it very slowly then.

Mr. Flynn: Yes. I will read from the transcript of testimony in Law 14859 of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, beginning at page 213 of said transcript of testimony.

Mr. Cass: What is the title of the case, please?

Mr. Flynn: The case being entitled, William C. Meyer, et al., plaintiffs, versus the Territory of Hawaii, defendant.

The Court: Let the record show that the Court is now confirming its former ruling upon this offer, which is that it is open to objection upon the ground of relevancy, competency and materiality, without regard to the ruling or any ruling or any effect of any ruling of the presiding judge at the former hearing.

Mr. Flynn: Beginning on page 213.

The Court: What are you reading, the direct examination?

Mr. Flynn: Yes. I will read it all. (Reading.)

JORGEN JORGENSEN

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Kimball): Are you a registered professional surveyor?

(Testimony of Jorgen Jorgensen.)

A. I am a——

Q. Engineer? A. Engineer.

Mr. Cass: We might shorten this. I will stipulate that Mr. Jorgensen was a qualified engineer and that he was employed by the Hawaiian Homes Commission to survey and construct a tunnel slightly above the Big Falls from the lands of Kahanui or from wherever the present intake of the tunnel is located to the lower land of Molokai. Maybe we can cut out two or three pages.

The Court: Do you accept the stipulation?

Mr. Flynn: Yes, your Honor, except that it saves us very little time.

* * * * *

Q. When was construction commenced?

Mr. Flynn: I will say in parenthesis that this refers to the tunnel construction.

A. I think it was in February 1924.

Q. And when was it completed? [581]

A. In October 1924.

Q. Before the construction was commenced I assume you ran a line for the tunnel, did you not?

A. I did.

Q. Before you ran the line for the tunnel, did you do any survey work?

A. I did, and I located, I tried to locate all the boundary between Kalamaula and Kahanui and I found every one of those corners.

Q. Everyone of Mr. Monsarrat's corners, you say?

A. Yes, cornerstones.

(Testimony of Jorgen Jorgensen.)

Q. Cornerstones. Did you consult any documents before you did your work?

A. I did. I went to the Bureau of Conveyances and got a description and the boundary of Kahanui, that particular part of Kahanui.

Q. What was the document that you consulted in the Bureau of Conveyances?

A. I got a copy of the description of the boundary.

* * * * *

[582]

Q. In addition to what you have testified already that you did, did you ask any person on Molokai whom you thought might know the boundaries of Kahanui?

* * * * *

A. I did, I first consulted George P. Cooke. At that time he was executive secretary of the commission. He and I went up there together. Later when I started the survey for this business I employed Albert Meyer and he was with me there three or four years on a survey party or on pipe work and all kinds of things like I used him for and in this particular case I asked him as being an old-time person on Molokai, if he knew where this boundary was. After showing him the boundary stone, and he said he didn't exactly know, but he [583] pointed out a place to me up above a waterfall (indicating on paper) and he thought that was the direction the boundary went to.

* * * * *

Q. Now, where was that place that Mr. Meyer

(Testimony of Jorgen Jorgensen.)

pointed out to you in relation to the intake of Waihanau Tunnel?

A. I should judge it was about 1,000 or 1,500 feet above where the intake is.

* * * * *

[584]

Q. Is this Mr. Meyer living now?

A. I understand he is dead a couple of years ago.

* * * * *

Q. (By Mr. Kimball): Do you know what relation that Mr. Albert Meyer was to Mr. R. W. Meyer?

A. So far as I know, he was a son.

* * * * *

[585]

Q. Mr. Jorgensen, after you did the work you have told us about, prior to the time the construction of the tunnel was commenced, to what conclusion did you come with regard to the boundary between the government land and the Meyer land in the vicinity of the tunnel?

A. As near as I could figure out from the description given me from this description you showed me, I could not say that I would transgress on anybody's property, and to be sure of that I run my tunnel line, after I figured the tunnel line, I ran it over the top of the mountain, over the top of the spur from Kahapakai, to be sure I was outside the boundary of Kahanui.

The Court: Did you flag your line?

A. I did.

Q. (By Mr. Kimball): During the time the tunnel was being constructed, did anyone of the

(Testimony of Jorgen Jorgensen.)

members of the Meyer family make any protest about it?

A. No, I was never approached on the subject.

Q. After the tunnel was constructed and during the time you were employed by Hawaiian Homes Commission on Molokai, were any protests made about the tunnel by any members of the Meyer family? [589]

A. Not that I know of. None to me personally.

* * * * *

(Reading from transcript:)

Cross-Examination

* * * * *

[590]

Q. You located Point X?

A. I located this point (indicating) and as near as I could see from the description of the boundary, I seen that the boundary did go through the head of Waihanau.

* * * * *

[591]

Q. The document to which you have referred, that is, one like the one you used, had a sketch on it, did it not?

A. No, I never saw it.

Q. You never saw a sketch?

A. I never saw a sketch.

Q. Before running your line, you did not see a picture like that (indicating)?

A. Yes, I had that. I had a map showing—

* * * * *

[593]

Q. Is there any place in the line that you determined in your mind was the line of the land of

(Testimony of Jorgen Jorgensen.)

Kahanui which was the head of Waiahanau Valley?

A. There was no direct point, naturally I would say that the boundary line would go up toward the head of the valleys.

Q. What marks the head of a valley?

A. Well, you see it would be where the angle—the angle where there is no more valley.

Q. The angle where there is no more valley. Then why did you not go clear around instead of cutting across Waihanau Valley at this point here, marked “pipe” on Exhibit 6, instead of crossing the stream there, if that is where you crossed; is that where you crossed? [595]

A. No, I never go over there.

Q. You never did go over there?

A. No. I was satisfied with the boundary as we surveyed down here.

The Court: The witness points to the boundary Y-X and then brings his hand up towards the ridge line, up to K and around, but I do not know what he means thereby.

Q. (By Mr. Kemp): Were you not influenced more by the picture you saw than you were by any written contents?

Mr. Kimball: What picture?

Mr. Kemp: On the map he says he had before him.

Q. Is that not what influenced you?

A. No. Naturally I would look at the sketch and the—what influenced me was this: That it said “towards the head of the valleys.”

(Testimony of Jorgen Jorgensen.)

Q. I beg your pardon, Mr. Jorgensen. Will you look at it again?

A. Yes. (Examining paper), "Thence toward"—

Q. No. "Around." A. "Around."

Q. That is around the head? A. Oh.

Q. Not "toward"?

A. Well, this, of course, that does not mention the Waihanau Valleys, it only says Waihanau and Waialeia Valleys.

Q. Yes. This one you are looking at, the other one you said you had did have the words in it. That is the only difference. Now if you are hunting for the head of a valley, if you don't go to the very end of the stream or water shed [596] that the valley forms, what natural object would stop you in finding the head of a valley?

A. That would be only waterfalls and places you could not get over.

Q. If I tell you the water, Waterfall No. 1, there is a waterfall that neither man nor beast, so it has been testified in this case, can go up or down, and that there is no other such place from that waterfall clear onto the head of this stream, what then would you say is the head of Waihanau Valley? A. Well——

Q. The place where neither man nor beast could go up or down or——

A. Well, this stream; that is a big body in itself, you know.

Q. Yes. A. All the way up.

Q. I am asking you now the specific question,

(Testimony of Jorgen Jorgensen.)

Mr. Jorgensen. You said if you are not going to take in the whole stream it would have to be some natural object, such as a waterfall, that you could not go up or down. Those were your own words, were they not?

A. Yes, but I want to modify that. That would not necessarily end the valley.

Q. I understand.

A. Because you could not get over it; you might be able to make headway on top.

Q. Yes. But you have answered me, if you are not going to take in the whole valley you would look for some natural [597] object that would be an obstruction that you could not pass; that is true, is it not? A. Yes.

Q. Such as a waterfall? A. Yes.

* * * * *

Q. At the place where you fixed as this line coming along here, you knew it would cross Waihanau Stream, as you said, some one thousand or some 1500 feet above the portal of the tunnel?

A. That was my——

Q. Estimate of——

A. My estimate and from all information I could get from persons who know, who thought they knew; they did not tell me they knew exactly, but they told me.

Q. But you could not find anything which you could define as a natural head of the valley at the point where it would cross?

A. No, but I also took this in consideration; di-

(Testimony of Jorgen Jorgensen.)

rect line from here to the trig station.

Mr. Kimball: What do you mean by here?

Mr. Kemp: X. [598]

The Witness: X. That line would still be above my intake.

Q. (By Mr. Kemp): Yes, but you know that a direct line given in that way does not mean that the direct line is the boundary, do you, Mr. Jorgensen?

A. Oh, I know that is simply the direction.

Q. Yes. That is a very common thing going along the seashore, is it not, you have got two points on the seashore and they connect the direct azimuth and distance between the two points, but that does not mean that the seashore, just that line, does it?

A. No.

Q. Nor that when you are going around the head of these two valleys that you are going to follow that direct line, would it, Mr. Jorgensen?

A. No.

Q. Did that direct line influence you in fixing your line where you did?

A. It gives me some way of directing where the intention was.

Q. Approximate that line. A. Yes.

Q. You wanted to approximate that line?

A. Yes; it gives the direction.

Mr. Kemp: Yes. That is all.

Q. (By the Court): Mr. Jorgensen, a few moments ago, when the shorthand reporter could not hear you and all the lawyers gathered around the

(Testimony of Jorgen Jorgensen.)

board, and you were using your left hand to [599] indicate, you were indicating out from X up around that bend to K, and said something about Albert Meyer. Do you recollect what was on your mind at that time?

A. Well, what was on my mind was this. That I wanted to find out as near as I could if he knew anything where this boundary line was, because it is not described exactly, and he showed me the waterfall and a big pool way up above. He said he thought that was where that boundary line came.

Q. Did you go down to that waterfall?

A. I went up to it.

Q. You went up to it? A. Yes.

Q. What sort of waterfall was it?

A. It was not a very high waterfall, a waterfall say about 20 or 25 feet, and a big pool at the bottom of it.

Q. Did anybody give you any name for that pool? A. No, none whatever.

Q. When you were pointing to this bend up around from X to K. A. Yes.

Q. Around the ridge there, did you actually survey that ridge at the time you were laying out your tunnel there?

A. You mean over here (indicating)?

Q. No. You see where it is marked K?

A. Yes.

Q. Along from X to K is a broken ridge line. Do you see what I am indicating? A. Yes.

Q. My question is, did you actually walk along

(Testimony of Jorgen Jorgensen.)

that ridge [600] top there with your gang?

A. I walked all the way around here and I made a trail here, somewhere. Of course, it is hard to get down to the water, and furthermore made a trail all the way along my survey line to this tunnel.

Q. You confined yourself from the upper part, from X to K? A. Yes.

Q. Did you walk along that region with this Mr. Meyer you were referring to?

A. I did.

Q. Did you go up beyond with him?

A. I think we went up there farther.

Q. Was he in your gang when you made the location of the intake? A. He was.

Q. Any other of the Meyer family come up around there at any time?

A. I don't remember; I don't remember any of them.

Q. At any time was the region of the lower falls marked on that map No. 6 as Falls 1 and 2, at any time were those ever pointed out to you as being within the or boundary of private land?

A. No.

The Court: That is all I wanted.

* * * * *

[601]

The Court: Now you propose to read Mr. Howell's testimony, Mr. Flynn?

Mr. Flynn: Yes, your Honor.

The Court: Proceed under the same conditions and rulings relative to objections as to the prior testimony of Mr. Jorgensen.

Mr. Flynn: Reading, beginning at the top of page 281 of the transcript of testimony in Law 14859.

(Reading.) [618]

HUGH HOWELL

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Kimball): What is your profession, Mr. Howell?

A. Civil engineer and surveyor.

* * * * *

[619]

Q. Did you know Mr. M. D. Monsarrat in his lifetime? A. Very well.

Q. Did you ever work with him?

A. Yes, in 1894.

* * * * *

Q. Are you familiar with his method of surveying? A. Yes.

Q. What is your opinion of it?

A. I think there is no better surveyor, especially in those times. I never knew of any better surveyor than M. D. Monsarrat; very, very particular, very careful, and very meticulous in making his descriptions so that they will be followed by a later surveyor.

Q. Have you had occasion to consult maps prepared by Mr. Monsarrat? [620]

A. Very many times, yes.

(Testimony of Hugh Howell.)

Q. How do you find his maps?

A. Very clear and correct.

Q. Do you know whether or not Mr. Monsarrat made use of kamaainas in his field work?

A. Yes, always. I have had many conversations with him along those lines and that is the first thing he did was to get information from kamaainas who were living then. There are none of them living now of course.

Q. By kamaainas you mean whom?

A. Literally, children of the soil. It means the oldtimers that are acquainted with the vicinity. They gave him the information regarding boundaries of lands and corners and who made the surveys, and so forth.

* * * * *

Q. (By Mr. Kimball): Mr. Howell, have you had occasion to familiarize yourself with lands belonging to the Meyer family on the island [621] of Molokai in the vicinity of Waihanua Valley?

A. Yes.

Q. What was that occasion?

A. I was employed by Hawaiian Homes Commission to make extensive improvements to its water system, particularly to build new pipe lines from the outlet of Waihanau Tunnel down to their homestead area.

Q. When was that?

A. 1933. I made an early report, a preliminary report, I think in February, and began actual surveys for location and plans for the building begin-

(Testimony of Hugh Howell.)

ning in June, June 30, and it was necessary before expending a large sum of money—we planned to spend a quarter of a million dollars, it was necessary to find out whether the water source and tunnel system was on privately owned or government land.

Q. Now, what did you do in order to find that out?

A. I inquired first of Colonel Jorgensen, who had designed and built the tunnel. He assured me that he had made surveys, and he showed me his map showing that the tunnel lines were on government lands. I analyzed it and got hold of description of the Meyer property. Also then went to the government survey office and studied and analyzed the boundaries from Monsarrat's original working sheets and satisfied myself from both of those maps and surveys and base points on the ground, which I had identified by kamaainas to me, the most northerly corner, the end of the measured courses, there were several courses that Monsarrat measured, actually ran them out on the ground, and there is a course there that is very well known, and it agreed with the location of the [622] topography as shown on the map and as I observed on the ground. I went further than that, knowing that Mr. Harvey had made surveys up in that vicinity, I went to him and asked him if he had made a survey of that particular land. He said he had. I asked him, "How is that tunnel; is that tunnel on government land or Meyer property?" He said, "It is on

(Testimony of Hugh Howell.)
government land. You can go ahead fearlessly and protect your improvements.”

I also examined the land. I did not take any marks. I found that courses had been done, the courses of that land is not so much in the instrumentality as the interpretation of the description as given in the deed of that portion of Waihanau to the Meyers, I think it is 3400 and something, I have forgotten the exact number. But it is——

Q. Grant 3437?

A. 3437. I satisfied myself from those three different sources that we were indeed on government land, and went ahead fearlessly and put through the improvement, which cost approximately a quarter of a million dollars. I had not heard of anybody's report of private owners at that time or any claim at that time that the lands where our water system was to be were privately owned.

Q. In connection with the interpretation of the boundary line in this grant, did you make any observations or study of the topographical features of the land?

A. Yes. Inasmuch as the last two courses in that description are not by actual surveys but by statement that “Thence around the head of Waihanau and Waialeia Valleys,” I assured myself by visual observation that the head of Waihanau Valley [623] at least, which was the only one I was interested in, was a considerable distance above the intake of our tunnel. An inspection of Monsarrat's map, which is very easily interpreted, shows clearly enough that

(Testimony of Hugh Howell.)

the boundary from the end of the last measured course runs along the top of the valley right at the top of the hachure marks, showing the slope of the palis, and then a quarter of a mile or so above that particular point I mentioned, it runs across Waihanau Valley. As a matter of fact, the end of Waihanau Valley, according to Monsarrat's map, is right at that point. Waihanau Valley is a local name. Above that is the land of Kahanui and below it is the land of Makanalua, according to Monsarrat's map. As I understand it, the grant sold to Mr. Meyer is in the land of Kahanui and apparently on his map the boundary of Kahanui and Makanalua is at the upper end of that portion of the valley that is called Waihanau.

Q. I hand you Exhibit 11 and ask you if that is a photostat of Monsarrat's working sheet?

A. Yes, this is undoubtedly a copy of the working sheet that I studied. Waihanau Valley, as you will see, apparently ends at the line designated by Monsarrat as the boundary of this grant from the point up here in Kamiloloa, along the Mahanui Road, I am very familiar with that road, I have gone up there a hundred times. That point is well known. The Meyers have a cabin right inside there. This course, this course, this course, the first three courses on the west side, were measured, the only ones measured.

Q. (By the Court): You are referring to the course where the letter Y and [624] X appear?

A. Yes. X is the end of those three courses. The

(Testimony of Hugh Howell.)

first course is not marked. The third, the head of Waihanau Valley, is very definitely shown here, and Waialeia Valley, which I am not particularly interested in, around to another point, which is very definitely surveyed, Kaluahauoni, which is a government triangulation station, and then around there. I could not conceive that there was any other interpretation of the location of this land except as shown on this map.

Q. (By Mr. Kimball): Now, Mr. Howell, can you describe for us the topographical features which you found or felt established the head of the valley?

A. From various points down here, Kaohu and various other points, I walked down this pali, down this place. In fact, I walked all along the valley from station Kaohu you see over to the intake. It was a terrible walk and I will never do it again.

Q. (By the Court): You say that is a terrible walk?

A. A steep pali and sliding material, rather dangerous. When I got started I wished I had not. After I got started I did not stop; I had not time, I had to go through.

Q. You mean it is terrible on the top of the palis?

A. The tops of the palis all right.

* * * * *

[625]

A. All I wanted to bring out was I could see the upper end of this where it looks as though the valley was broken off by the fact the ridges are running down in there and that looks like a logical

(Testimony of Hugh Howell.)

place to be called the end of Waihanau. That is just a local name.

Q. (By Mr. Kimball): What point now are you referring to?

A. Crossing the valley. Approximately northeast and southwest, approximately along the line of this boundary that is nearly northeast and southwest.

Q. Do you recall what direction the stream takes at that point?

A. You mean the point at the head of the valley?

Q. The point you have just been talking about?

A. Yes. Oh. It winds in there, winding around sort of a letter S in there, as a matter of fact, the valley, the valley goes up a way farther up, but the valley that is called Waihanau, according to this map, must end right there from the location of the words on Monsarrat's map made by his own hand. Waihanau is unquestionably a local name. It is not the name of a ahupuaa. The ahupuaa is Makanalua, and above that is Mahananini.

Q. Now, Exhibit 6, have you had occasion to study this map?

A. No. Very slightly; but I can see it is the map of this same region.

* * * * *

[626]

Q. Can you tell us by proper indication on the map where the head of the valley is, as you considered it and have discussed it yourself?

A. Up above in here. "Waihanau Valley," printed in Monsarrat's own, by his own hand. I

(Testimony of Hugh Howell.)

know his writing. Right in here. It ends about here.

Q. (By the Court): Right here?

A. It ends about where his boundary crosses.

* * * * *

Q. (By Mr. Kimball): Is that the place where you noticed these two ridges?

A. Yes. Apparently going past each other, blocking off the valley. That is a very common occurrence in many places. I know what it is. It is a crook in the stream. I have seen that crook in the stream from up here somewhere. I did not identify it.

Q. Near where?

A. Up near where this boundary leaves this ridge, you have a letter in there; I can't see it.

Q. The word "pipe" in red?

A. Yes; that is the place. [627]

Q. You have looked across from that point?

A. Yes.

Q. Have you looked up to that point, rather, have you looked up the valley from the bottom or from a point near the bottom of the valley?

A. Yes. You could see it from down here somewhere. I don't remember just the point.

Q. Down where from where?

A. Down near the big waterfall you can see something blocking off the valley up at this point. I did not go down into this letter S in the stream, where our boundary was okay. It was not necessary. I was interested in determining whether this tunnel was on government lands or on privately

(Testimony of Hugh Howell.)

owned lands. I satisfied myself by consulting Monsarrat's map and working up in here and assured myself that the place he was shown is the logical—could be called logically the head of Waihanau Valley.

Q. Yes.

A. It is not the head of the whole valley, however. The whole valley goes way up farther, but that portion called Waihanau, that would be the logical place to call that little locality Waihanau.

* * * * *

[628]

Q. When you can see the condition you described farther up, were you right at the head of the big waterfall or down in the valley, somewhere near it?

A. I won't be certain about it but I know that I have noticed this sort of breaking off of the valleys from points below. It is so long a time.

Q. Can you see that condition from the trail going down? A. Which trail?

Q. The trail going down to the intake?

A. Oh, I think so, yes. I would not be positive though. It has been two years since I was there and I would not be sure but I know I have seen that formation apparently blocking off the valley from some points below. Just where, I am not positive.

Q. And you also have seen that condition from points along the ridge, I take it?

A. Yes, from above.

* * * * *

[629]

(Testimony of Hugh Howell.)

Cross-Examination

Q. When you read the description in Grant 3437 where you had gone through all of the surveyed legs of the description wrote, "And thence around the head of Waihanau and Waialeia Valleys to government survey triangulation station"—

A. Kaluahauoni.

Q. ——"Kaluahauoni, the true azimuth and distance being so and so," you began to hunt for something to indicate where the head of those valleys was, did you not?

A. I took Monsarrat's line on the map.

Q. You were influenced by his map, rather than by any natural features?

A. Yes, but I did notice at that particular place that it seemed to be broken off. As this comes down farther above I could see what that breaking off was. It was two ridges, one from each side passing each other.

* * * * *

[631]

Q. Is there any such obstacle in the valley as that big waterfall at the point where you now say is the head of Waihanau Valley?

A. I went up above there, I suppose it is a quarter of a mile, that is pretty close to where Monsarrat's line shows, and I could not get up without actually cutting a trail up around the waterfalls considerably less higher than the big one we have been talking about. You could not get up there without cutting a trail. In fact, I had a rope

(Testimony of Hugh Howell.)

to go up there too. My men were more like monkeys than I and they gave me a rope and gave me a chance to pull myself up 25 or 30 feet, something like that.

Q. Mr. Newton has given us the benefit of the height of these various falls above the tunnel, and they range anywhere from seven feet to twenty feet in height.

A. I should not question that. I never had any occasion to measure them.

* * * * *

[632]

Q. I believe you stated on direct examination that after you reached the point we call X on Monsarrat's map, from there on the description of this survey depends upon interpretation?

A. Absolutely yes; the whole line from this point X way up [634] to the initial point.

Q. Yes.

A. Excepting the one point Kaluahauoni.

Q. Yes.

A. Fixed by interpretation; all the rest is interpretation.

Q. You have a distinct interpretation from that point Kaluahauoni to Point X? A. Yes.

Q. There are many other interpretations from there on?

A. There are many interpretations from there on, not only interpretations on the ground but interpretations on Monsarrat's map. That is all I went by, as much as the interpretation on the ground, Monsarrat's map is the only information

(Testimony of Hugh Howell.)

that I know of that gives anything like the limits of Waihanau Valley. And I should call the limit of Waihanau Valley, which is only a local name of a small area, I should call the limit of Waihanau Valley is the boundary line of this grant as shown in the description on the map.

* * * * *

[635]

The Court: Any rebuttal, Mr. Cass?

Mr. Cass: Yes. I wish to introduce from this record the testimony of William A. Meyer, who is dead. Is that stipulated?

Mr. Flynn: That is stipulated.

* * * * *

[645]

Mr. Cass: Reading from page 139 of the record, transcript No. 884, in Law 14859, Circuit Court, First Judicial Circuit, William C. Meyer, et al., plaintiffs, versus The Territory of Hawaii, defendant.

(Reading.)

WILLIAM A. MEYER

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Kemp): You are a resident of Molokai? A. Yes, sir.

Q. Born and raised there? A. Yes, sir.

Q. Lived there all your life?

A. Lived there most part of my life.

(Testimony of William A. Meyer.)

Q. What relation were you to R. W. Meyer?

A. Grandfather.

Q. One of his sons your father?

A. Yes, sir.

* * * * *

[646]

Q. You have lived on the lands of the Meyer estate all of your life?

A. Yes, sir.

* * * * *

[647]

Q. Have the older members of the Meyer family ever pointed out to you or told you where any of the boundaries of the lands of Kahanui, covered by Grant 3437, was?

A. Yes, sir.

* * * * *

Q. What was the occasion for their giving you that information?

A. We were up hunting one day during the American Sugar Company's time and they had two men from the Coast, which they hired for shutting off deer from the lands, and one day after killing four or five deer we packed to Waihanau on top of the ridge, and these men stopped us and wanted to take us and have us arrested, and one of my uncles, Ben Meyer, told him he could explain the boundaries of his lands, and he did, and after he told him, he was satisfied and left us alone and we went home.

* * * * *

[648]

Q. Can you locate on Exhibit B about where you were when accosted by these men?

* * * * *

A. It has always been customary when we went

(Testimony of William A. Meyer.)

out shooting on these lands of Kahanui, start from Kaohu to Kahanui, along the boundary and over to the edge of the valley looking into Waihanau.

Q. Where on that particular occasion did these hunters accost you?

A. After shooting a deer down in the stream of Waihanau we packed it on top of this ridge. While we were there the hunters came along the boundary and stopped us and asked us why we were shooting on their lands, and one of my uncles spoke up and said, "They are our lands," and he said, "I can satisfy you by showing you the boundaries." Which he did. He walked over here and showed him this boundary (indicating [649] on exhibit).

Mr. Kemp: It is already marked Y.

Q. You know where the mouth of the tunnel is now?

A. I do.

Q. Where was it with reference to the mouth of the tunnel?

A. Just about 10 feet above the mouth of the tunnel.

Q. Just about 10 feet above the mouth of the tunnel. You had started up?

A. Yes. We walked over and showed him this boundary and back again, and my uncle Ben told him our boundary was at the edge of the valley down to the highest waterfall, and after he showed them that, they were satisfied, so they went along their own way and left us alone.

* * * * *

[650]

Q. A narrow, rough ridge. You may now be

(Testimony of William A. Meyer.)

seated. In your younger days were you acquainted with any old-timers in that vicinity who are now dead and who made statements to you as to these lands? A. Yes, sir.

Q. First, before asking you what they said, I shall ask you who the people were that made such statements to you?

A. An old Hawaiian by the name of Ku.

Q. Ku?

A. Another one by the name of Alalalona.

Q. Are they both dead?

A. They are both dead.

Q. Tell us what, if anything, you know that gave them special knowledge of the location of lands in that community?

A. They practically lived up in the same location where we are today, and they were cowboys on the ranch, and every time we would go out driving or when we were driving they would always tell us where our boundaries were; they always kept us [653] posted. In fact, Ku was practically raised by my grandfather.

Q. Did they ever tell you what was the head of Waihanau Valley? A. Yes, sir.

Q. What did they say was the head of Waihanau Valley?

A. The head of Waihanau Valley——

Mr. Kimball: Just a moment, Mr. Meyer. Object, if the Court please, on the ground the answer calls for hearsay, based on conclusions of persons now dead and could not be brought in. * * * * *

(Testimony of William A. Meyer.)

The Court: I overrule your objection at this time and allow the testimony to come in, Mr. Kimball. If you can satisfy the court by any authorities this idea of yours is more than an idea under the law, why, of course, you may attempt to bring it in. Objection will be allowed for the purpose of the record.

Q. (By Mr. Kemp): For the purpose of a little more specific information [654] as to who these men were, you say this man Ku was practically a member of your grandfather's family?

A. Yes, sir.

Q. Reared by him, with him as long as he lived?

A. Yes.

The Court: How old a man was he?

Q. (By Mr. Kemp): How old a man was he when you were talking with him?

A. Oh, I would say he was all of fifty years, anyway.

Q. How many years was that from now, back, when he was telling you this?

A. You mean how old?

Q. No. Give us an idea as to when it was.

A. He was about fifty when he was telling me this.

Q. About when was it he was talking to you about these lands; was it all at one time or over a period of years?

A. Oh, off and on, every time we went driving.

Q. How long has Ku been dead?

(Testimony of William A. Meyer.)

A. Ku has been dead about 30 years, I think; 30 or 35 years.

Q. Did he talk to you about it shortly before his death, or was it a long time before his death?

A. No; quite a while before he died.

Q. About how old were you when he was talking to you? A. About 20, between 19 and 20.

Q. Did he tell you where the head of Waihanau Valley was? A. Yes.

Q. Did he tell you anything about where the boundaries of the Meyer lands was in Waihanau Valley?

A. Yes. He always told us where the boundaries of the [655] Meyer lands in Waihanau Valley were.

Q. Where did he say the boundary was of Waihanau Stream? Did he point out to you or did he tell you something?

A. He told us we had right up to this point, and along down and he would always say that is the boundary of Waihanau.

The Court: I can't see where he is pointing.

Mr. Kemp: He is following the ridge he says exists there down to the waterfall, if I may interpret his testimony, through the waterfall and up the ridge on the other side to the top. That would be from D to E and from E to W.

Be seated again.

Q. What was the name of this other old man that talked to you about these boundaries?

A. Alalalona.

Q. Who was Alalaona?

(Testimony of William A. Meyer.)

A. He was another Hawaiian cowboy on the ranch.

Q. He had been with your family for a long time? A. Yes, sir.

Q. Worked on the ranch under your grandfather? A. Under my grandfather.

Q. Did he tell you where the head of Waihanau Valley was too? A. Yes.

Q. And where the boundaries of your lands were? A. Yes, sir.

Q. Did it coincide with what Ku had told you?

A. Yes.

Q. These two uncles, Otto and—— [656]

A. Ben.

Q. Otto and Ben, are they the only ones of your uncles that ever told you about boundaries up there?

A. All my uncles, in fact, told me about the boundaries.

Q. But the occasion that stands out in your mind right now is the one with the hunters?

A. I traveled with those two, Otto and Ben, most of the time.

Q. Did they ever in their talk state what was the head of Waihanau Valley? A. Yes.

Q. What did they say was the head of Waihanau Valley?

A. The high falls is the head of Waihanau Valley.

Q. By that you mean the big waterfall, the E on this map? A. Yes, sir.

Q. Where you pointed out the line coming down

(Testimony of William A. Meyer.)

off the ridge? A. Yes, sir.

Q. Along a steep ridge.

Cross-Examination

Q. (By Mr. Kimball): The hunters or men who spoke to you back in about 1900, wasn't it?

A. Between 1899 and 1901.

Q. They were employees of the American Sugar Company, weren't they? A. They were.

Q. Do you know whether or not the land of Makanalua was leased by the government to the American Sugar Company at that time? [657]

A. It was.

Mr. Flynn: Just a minute, Mr. Cass. I have a correction on my copy. Where that question reads, "Do you know whether or not the land of Kalamaula was leased by the government to the American Sugar Company at that time?" I am quite confident that is correct. I wonder if you have any objection to that.

Mr. Cass: I have no objection to that because I am quite sure no part of the Leper Settlement was ever leased by the government and I know that Kalamaula was leased to the American Sugar Company.

Mr. Flynn: Yes. There are many other records that could back that up. If you will stipulate with me——

Mr. Cass: I will stipulate that word "Makanalua" is incorrect and should be "Kalamaula."

(Testimony of William A. Meyer.)

Mr. Flynn: The same way in the next question you read too.

Mr. Cass: I will repeat that question.

“They thought you were on Kalamaula and you showed them you were on Kahanui, when they stopped you, didn’t you?”

A. Yes.

Q. They didn’t claim you were on lands called Makanalua, did they?

A. No.

* * * * *

[658]

Redirect Examination

Mr. Flynn: I make objection, if the Court please, to that portion of the testimony beginning on page 145 having to do with the examination of this witness William Meyer as to what he was told by the two cowboys Ku and Alalalona, my objection being is that it was hearsay, as raised by the question, raised by counsel at the time of the earlier trial, that it was not qualified as kamaaina testimony.

The Court: Objection overruled. The record contains ample foundation for its admission as kamaaina testimony.

Mr. Flynn: May my exception be noted, please.

The Court: Your exception may be noted.

Mr. Cass: Now, if the Court please, we offer in evidence a copy of the eminent domain proceedings in Circuit Court of the Second Judicial Circuit, Territory of Hawaii, entitled Territory of Hawaii by Lyman Bigelow, its Superintendent of Public Works, versus Otto Meyer, et al. I do not see any

(Testimony of William A. Meyer.)

number on it. It is stamped "Filed, January 6, 1929, Manuel Asui, clerk, and duly certified by the clerk. For some reason the number does not appear in the abstract.

Mr. Flynn: The entire offer of [663] the exhibit I regard as on a matter that is incompetent, irrelevant and immaterial to the present application for registration of the lands, and I will object on that ground.

* * * * *

The Court: The objection is overruled.

Mr. Flynn: Note an exception, please.

The Court: An exception may be noted. It will become Applicant's Exhibit W in evidence.

(The document referred to was received in evidence as Applicant's Exhibit W.)

Mr. Cass: Now, the description of the lands pertaining [664] to Grant 3437, R. W. Meyer, on page 6 of this exhibit, is apparently taken from the grant and does not vary except at the end of the paragraph this further description is included: "That said parcels of land hereinabove referred to and described are more fully set out and shown upon two maps attached hereto as Exhibit A and Exhibit B, which exhibits are hereby made a part hereof and incorporated herein." The difference between this description and the grant description is that the grant description has no words incorporating the maps attached into the description. The

map referred to, which refers to these particular lands, is shown here by our application, the overlay interposed on the sketch attached to the grant; it appears that the sketch attached to the grant and the land under application is limited by a very similar sketch.

Mr. Flynn: Well, the sketch in this exhibit you have offered is substantially identical with the one of the grant shown by this tracing.

Mr. Cass: Yes. That is the point I was making.

Mr. Flynn: No question.

Mr. Cass: Now, in connection with the testimony of Mr. King and the testimony of Mr. Carson as to an appraisal that they were making, I offer in evidence and ask to be permitted to read it in evidence the report of Samuel W. King on that appraisal. It is contained in a letter dated April 11, 1929, and the pertinent parts are: "April 11, 1929. Directed to Judge A. G. M. Robertson, Castle & Cooke Building, Honolulu, T. H.

"Dear Sir: [665]

"Herewith is a summary of my appraisal of the Meyer lands on Molokai, included in the forest reserve that the government is desirous to condemn."

It contains the appraisal signed "Samuel W. King."

Is there anything further in that that you wish to go in?

Mr. Flynn: Do you want to introduce the whole letter in evidence?

Mr. Cass: It does not make any difference to me.

Mr. Flynn: Have you read enough of it that you want to go in?

Mr. Cass: It reads enough for me.

Mr. Flynn: I have no objection to that.

Mr. Cass: I offer that to show the Court the purpose of the survey and the limitations placed upon the lands that were then being surveyed and appraised, as being a different survey and appraisal than the actual boundaries claimed by the Meyers but limited to the boundaries as set out in the sketch attached to the condemnation action.

Mr. Flynn: Wait a minute. May I hear what that offer is again?

Mr. Cass: I offer this transcript of the case itself, showing the description of the lands which were being condemned, and now I offer the report of Mr. Samuel W. King of an appraisal made specifically limited to the lands under condemnation.

Mr. Flynn: I will make no objection to all of that.

* * * * *

[666]

The Court: Further rebuttal?

Mr. Cass: Mr. McKeague.

BERNARD H. McKEAGUE

a witness called by and on behalf of the applicant, having been previously sworn, was further examined and testified as follows:

The Court: The record shows that Mr. McKeague has been sworn.

Direct Examination

Q. (By Mr. Cass): Mr. McKeague, have you prepared an outline of the sketch appearing upon Grant 3437 blown up to 400 feet to an inch?

A. I have.

Q. Can you place upon the map on the board there the blown up or overlay of it and trace it on the map, Applicant's Exhibit A? A. I can.

Q. Where that line would run if the map were laid on the ground. Now, can you by any means transcribe that mark onto the map below?

A. I can.

* * * * *

[667]

A. And I will trace from the trig station Kaluahauoni along that line to the cross X.

* * * * *

Mr. Cass: I have marked it "McKeague's tracing," the line that he just marked in there.

* * * * *

Q. Now, as I note on the map here, the line goes through or close to the point marked "pipe" at the end of the first dotted line course shown on the map there? A. Yes.

Q. Now, from that point to the point where the green line and the line you have traced across the

(Testimony of Bernard H. McKeague.)

stream, do the lines [668] approximate each other?

A. Yes. At a point about 100 or 150 feet below, what is shown here as "Waiau Falls."

Q. That is where they coincide? A. Yes.

* * * * *

[669]

Cross-Examination

Q. (By Mr. Flynn): Didn't you testify when you began all this business, at the very beginning, that Points A and K were well located as you checked them against Monsarrat's notes?

A. By plotting only as you see it on that map, Exhibit A.

* * * * *

Q. On those old maps you saw that the lines go through K to A, didn't you?

A. No, never. [670]

Q. Calling your attention, Mr. McKeague, to Exhibit 11, and your attention specifically to Point X at the extreme north tip of Kahanui 3.

A. Yes.

Q. Doesn't that line go through Point K?

A. On this map it does.

Q. Doesn't that line go through Point A?

A. On this map it does.

* * * * *

The Clerk: We have Exhibit V for Identification, copy of letter, Department of Interior, in the Archives.

Mr. Cass: I don't care about that. It is not important at all, except as to certain irrelevant conclusions that judges made before.

The Court: Do you want to withdraw it?

Mr. Cass: I will withdraw it.

The Court: Let Exhibit V of the applicant, the offer of it be withdrawn.

* * * * *

[671]

The Court: Are counsel still in agreement that the one issue of fact presently for determination is the determination of the language "the head of Waihanau Valley," how the resulting ground boundary line resulted from that finding? That is, as I understand it, the original stipulation.

Mr. Flynn: Yes, that is it.

Mr. Cass: Yes.

Mr. Flynn: In other words, the first cause of action is just to settle that boundary line.

* * * * * [674]

[Endorsed]: Filed July 26, 1950.

[Endorsed]: No. 13545. United States Court of Appeals for the Ninth Circuit. *R. W. Meyer, Limited, Appellant, vs. Territory of Hawaii, Appellee.* Transcript of Record. Appeal from the Supreme Court for the Territory of Hawaii.

Filed: September 17, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13545

R. W. MEYER, LIMITED

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

APPELLANT'S STATEMENT OF POINTS
RELIED UPON

Comes now R. W. Meyer, Limited, Appellant, in the above entitled cause, by its attorneys, Phil Cass and Samuel Shapiro, and sets forth below the points relied upon by it in its appeal to the above entitled Court;

1. The decision of the trial court was fully supported by competent evidence and it was error by the Supreme Court of Hawaii to reverse the decision of the trial court.

2. The issues before the trial court were restricted by a stipulation entered into by the parties, that the sole issue to be tried was a question of the location of boundaries on the ground, described in the original grant as a course "around the head of Waihanau and Waialeia valleys". The evidence for the Applicant was factual oral testimony, supported by evidence of the intent of the parties and the record of the surveyor who wrote the description of the course at issue, fixing the boundary in accordance with Applicant's claim, while the Respondent Territory of Hawaii offered no proof or

evidence of the location on the ground of said line but relied on the opinions of government employees, without knowledge of the actual line, based upon a "meander line" of the said boundary, traced upon government maps at unknown times by unknown persons and reproduced without regard to known monuments by independent government surveys. It was error in the Supreme Court of Hawaii to accept and adopt the testimony so offered in fixing the boundary different from that adopted by the trial court.

3. The Supreme Court of Hawaii held in its opinion that a sketch attached to the original grant, which contained a "meander line", admittedly unsurveyed by traverse, and which contained no indication of monuments fixing said "meander line" on the ground, other than the starting and ending points, controlled the description of the land conveyed, and was superior in evidence to the language of the grant describing the course by natural monument. This was error by that court.

4. The Supreme Court of Hawaii held in its opinion that the boundary line adopted by the trial court required that the course adopted by the trial court to contain courses in addition to those of the "meander line" and thus altered a written instrument. This is contrary to the evidence, in that the course adopted passes over a ridge without width where the two valleys join. This ruling was error by the Supreme Court of Hawaii in that unsurveyed "meander lines" almost invariably require many courses when laid out by a traversed survey identifying the line on the ground, the adoption of the

line approved by the trial court does not require any course other than those located on the natural monuments described in the grant, and which the "meander line" purported to follow; the factual evidence shows that the boundary of the land known as "Waihanau valley" follows the trial court's line.

5. The Supreme Court of Hawaii held that there was a "vast reservoir" of maps in governmental files which showed and controlled the boundary. This is contrary to the evidence in that the government witnesses testified that all of the maps were copies of the original in varying scales, without additional surveys, so that there was but one map, if any, of evidenciary value, that this map was a "progressive map" with a sketch of the land under litigation added after the grant and without any survey or factual location of the line along the disputed boundary; that there never had been a survey of that boundary until the Applicant had it surveyed for this action; that there was no record as to the identity of the person who drafted the sketch on the original map and that many additions had been made by various parties unknown since the map was first made and no way existed to determine what was on any government map at the time of the grant. It was error in the Supreme Court of Hawaii to adopt or consider these map copies as having additional weight, if any, by virtue of the duplication.

6. The advertisement by which this land was sold by the government of Hawaii to the predecessor in interest of the Applicant, described the land as being the whole of the lele of Kahanui, in accord-

ance with a description on file, which is in evidence, and which does not refer to any map or other limitation on the description. The government has admitted the intent to convey the whole of the lele according to its ancient boundaries in the correspondence in evidence. If the actual location on the ground of the limits of the Waihanau valley had not been established by uncontradicted testimony in accordance with the finding of the trial court, the evidence of the intent of the parties, as shown by this government evidence, would have been binding on the court as fixing the line on the ancient boundaries, as shown by testimony of the witnesses and the survey of adjoining land by Pease, offered by the Respondent. As it stands, the evidence of ancient boundaries substantiates the testimony of the location of that monument. It was error for the Supreme Court of Hawaii to hold such evidence inadmissible in the face of the uncontradicted factual testimony it confirmed.

7. It was error for the Supreme Court of Hawaii to disregard the field notes of the surveyor who wrote the description for the grant, which, by sketch shown on page 112 of his field book, locates the line of the boundary as passing through the big water fall, and locates the Waihanau gulch below those falls.

8. It was error for the Supreme Court of Hawaii to direct the trial court to amend the decree by substituting the line of boundary claimed by the government for that in the decree when there was absolutely no evidence offered by the government by

persons familiar with the monument named locating that line or monument on the ground.

9. It was error for the Supreme Court of Hawaii to reverse a decree of the trial court founded on substantial evidence by a reconsideration of the weight, if any, of the evidence offered by the government and to try, *de novo*, the issue decided by the court below.

10. The issue tried in the Land Court was limited and stipulated by the parties to be the determination of the location on the ground of the location on the ground of the course described in the grant as "around the head of Waihanau and Waialeia valleys". The only evidence offered in the trial court and before the Supreme Court of Hawaii on appeal was that of the Applicant as to the location of that parcel of land known as "Waihanau valley", which was fixed as the name of the box canyon below the big falls, with the boundary being the line adopted by the trial court. It was error for the Supreme Court to attempt, by speculation, and without any evidence, to fix a boundary at any point not identified by evidence as the boundary of the valley, or to assume that the name "Waihanau valley" applied to any place not so identified.

Respectfully submitted,

/s/ PHIL CASS,

Attorney for Appellant

[Endorsed]: Filed Oct. 27, 1952. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND ORDER

Stipulation

It is hereby stipulated by and between the Appellant and Appellee by their respective counsel that for all purposes of the entitled appeal resort may be had to the original exhibits, in lieu of printing thereof.

Dated: November 5, 1952.

R. W. MEYER, LTD.,

Appellant,

/s/ By PHIL CASS,

Attorney

TERRITORY OF HAWAII,

Appellee,

/s/ By RHODA V. LEWIS,

Deputy Attorney General

Order

Pursuant to the Stipulation of the parties it is hereby Ordered that for all purposes of the above entitled appeal resort may be had to the original exhibits, in lieu of printing thereof.

Dated: November 10, 1952.

Approved:

/s/ WILLIAM DENMAN,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for
the Ninth Circuit

[Endorsed]: Filed Nov. 12, 1952. Paul P. O'Brien,
Clerk.